



**REPUBLIC OF KENYA**

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

**ELC. J.R. CASE NO. 37 OF 2017**

**[FORMERLY HIGH COURT JUDICIAL REVIEW APP. CASE NO. 15 OF 2014]**

**IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT 1990**

**AND**

**IN THE MATTER OF PROVINCIAL LAND APPEAL COMMITTEE NYANZA**

**AND**

**IN THE MATTER OF PROVINCIAL MAGISTRATE’S COURT- SIAYA**

**IN THE MATTER OF AN APPLICATION BY JACKSON OMONDI OYOO (PERSONAL REPRESENTATIVE OF THE ESTATES OF JANE AOKO OYOO (DECEASED) FOR ORDER OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PROVINCIAL LAND APPEAL COMMITTEE - NYANZA...1<sup>ST</sup> RESPONDENT**

**PRINCIPAL MAGISTRATE – SIAYA.....2<sup>ND</sup> RESPONDENT**

**JACKSON OMONDI OYOO (Personal Representative of the estate of**

**JANE AOKO OYOO (Deceased).....EXPARTE APPLICANT**

**WELLINGTON WASONGA.....INTERESTED PARTY**

**JUDGMENT**

1. Jackson Omondi Oyoo, the Exparte Applicant and Personal Representative of the estate of Jane Aoko Oyoo, commenced this proceedings through the Chamber Summons dated 28<sup>th</sup> March 2012 seeking for leave to commence Judicial Review proceedings for order of Certiorari and stay. The prayers were granted exparte on the 24<sup>th</sup> April 2012 and the Exparte Applicant directed to file the subtractive application in 21 days. That the Exparte Applicant then filed the notice of motion dated 14<sup>th</sup> May 2012 seeking for the following;

**1. “THAT this Honourable Court be pleased to make orders of certiorari to move into court and quash the proceedings and decision of Nyanza Provincial Land Appeal Committee in case No. 001/2007 and all adopted by the Siaya Principal Magistrate Court on the 20<sup>th</sup> January 2011 ordering that parties do jointly engage a surveyor to determine the correct boundaries.**

**2. THAT the honourable court be pleased to order for the adoption of the decision of the Siaya Land Disputes Tribunal made on the 15<sup>th</sup> April, 2007 ordering that the Land Registrar do cancel the title deed issued to Wellington Wasonga Okello and revert the suit land to the original owner Ernest Henry Mbogo Okello and that the same land be re-surveyed by the District Surveyor and divided into two – 3 ha be given to Eliakim Okelo and his son Wellington Wasonga Okello and the other measuring 1.36Ha to the Claimant Jane Aoko Oyoo with her sons.**

**3. THAT cost of this application be provided for.”**

2. The motion is based on the verifying affidavit sworn by the Exparte Applicant on 14<sup>th</sup> May 2012 and the statement of facts of the same date. The following is a summary of the Exparte Applicant’s case;

- **That he is the son to Jane Aoko Oyoo, deceased, who was the claimant in Siaya Land Dispute Tribunal Case No. 8 of 2004 over land Parcel North Gem/Ndere/249 measuring 4.3 hectares.**
- **That the tribunal award of 15<sup>th</sup> November 2006 was, among others, that 1.36 hectares of the suit land be registered with Jane Aoko Oyoo, deceased. That Eliakim Okello and Wellington Wasonga Okelo, the objectors in the tribunal case, filed appeal no. 1 of 2009 with Nyanza Land Dispute Appeals Committee who on 6<sup>th</sup> October 2010 ordered that “Both parties to jointly engage a Surveyor to establish the correct boundaries in the presence of Provincial Administration.”**
- **That the tribunal case was not about the boundary between North Gem/349 and 432 which issue could not have been a subject of the appeal.**
- **That the appeal committee did not deal with the order of the tribunal giving the claimant a portion of the suit land.**

3. The application is opposed by Wellington Wasonga, the Interested Party, through his replying affidavit sworn on the 13<sup>th</sup> November 2012, among others, deponing as follows;

- **That the tribunal had no jurisdiction to order cancellation of a title and subdivision of the suit land.**
- **That the Appeals Committee order for parties to engage a surveyor to help determine the boundary was within their jurisdiction.**

4. That though M/s Langat, Mr. Nyauma, M/s Ezedi and M/s Aliongo appeared in Court on various dates for the Respondents, there is no appearance, replying papers or written submissions found in the record by their chambers.

5. That the Interested Party’s Counsel and the Exparte Applicant filed written submissions dated 13<sup>th</sup> February 2017 and 22<sup>nd</sup> February 2018 respectively.

6. The following are the issues for the Court’s determinations;

- a) Whether the Nyanza Land Dispute Appeals Committee award was on a matter determined by the District Land Disputes Tribunal.**
- b) Whether the Siaya District Land Disputes Tribunal award was ultra vires their jurisdiction.**
- c) Whether the application for leave was filed within six months of the date of the award and or adopting of the award by the Court.**
- d) Who pays the costs.**

7. The Court has carefully considered the grounds on the notice of motion, statement of facts, verifying affidavit, replying affidavit, written submission by Counsel for the Interested Party and the Exparte Applicant and come to the following findings;

a) That from the copy of the proceedings in Siaya Land Disputes Tribunal Case No. 8 of 2004, the Claimant was Jane Aoko Oyoo while the Objectors were Eliakim Okelo and Wellington Wasonga Okelo, who is the Interested Party in this proceedings. That from the testimonies given by the three parties before the tribunal, the claim was for a portion of land parcel North Gem/Ndere/349 and not over a boundary dispute between that land and parcel 432.

b) That the tribunal jurisdiction was limited under **Section 3 (1) of the Land Disputes Tribunal Act Chapter 303A of Laws of Kenya**, now repealed to “**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.”**

c) That the claim lodged by Jane Aoko Oyoo, Claimant, against Eliakim Okelo and Wellington Wasonga Okelo, the Objectors, before the tribunal was obviously a claim over a portion of registered land which was beyond the legal mandate of the tribunal in view of the provision of **Section 159 of The Registered Land Act Chapter 300 of Laws of Kenya**, now repealed.

d) That the award of the tribunal directing that the title deed of the suit land in favour of Wellington Wasonga Okelo be cancelled

and that ownership revert to Ernest Henry Mbogo Okelo and further that the land be subdivided into two with one portion of 1.36 hectares being registered in the name of the Claimant and the other portion with the Objectors was also ultra vires the jurisdiction of the Tribunal in view of the provisions of the law set out above.

e) That the tribunal award of 15<sup>th</sup> November 2006 was read and adopted in Siaya P.M. Land Case No. 3 of 2007 on the 5<sup>th</sup> April 2007 according to the copy of the proceedings annexed to the application. That under the provisions of **Section 8 (1) of the Land Disputes Tribunal Act** appeals were to be filed in 30 days of the decision. Though it is not clear whether the parties were present when the tribunal made its award on the 15<sup>th</sup> November 2006, it is clearly indicated that they were all present when the Court read and adopted the award on the 5<sup>th</sup> April 2007. That accordingly, any party not satisfied with the award was expected to have filed their appeal by or about 5<sup>th</sup> May 2007. That the copy of the Nyanza Land Dispute Appeals Committee attached to the application does not disclose the time the appeal was filed. That the fact that the appeal reference is given as 001/2009 can only mean that it was filed in the year 2009 which is about one year seven months outside the 30 days prescribed in **Section 8 (1) of the Land Disputes Act**.

f) That the copy of the Appeals Committee proceedings does not indicate whether leave to file the appeal out of time was ever made or considered. That the opening statement attributed to Chairman that “There is no ground of appeal.....”, leave the Court considering what then was before the Appeals Committee for hearing. That the Court agrees with the Exparte Applicant that the decision of the Appeals Committee had nothing to do with the deliberations and award in the Siaya Land Disputes Tribunal Case No. 8 of 2004. The filing of the appeal therefore contravened **Sections 8 (3) of the Land Dispute Tribunal Act** that required that “**the appeal shall be in documentary form and shall contain a brief statement to be divided into separate grounds of appeal, of the reasons upon which the party appealing wishes to rely**”.

g) That **Sections 8 (9) of the Land Disputes Act** required any party not satisfied with the decision of the Appeals Committee to file an appeal with this Court in Sixty (60) days. That there is no evidence of any of the parties having lodged any appeal within that period or any other time thereafter. That instead, this judicial review proceedings was commenced through the Chamber Summons dated 28<sup>th</sup> March 2012 in accordance with **Order 53 of Civil Procedure Rules**. That **Order 53 Rule 2 of the Civil Procedure Rules** requires the application to seek leave to be filed before the lapse of six months from the date of the decision impugned or being challenged. The copy of the proceedings in Siaya P.M Court Land Case No. 3 of 2007 confirms that the Appeals Committee decision was read in the presence of the parties on the 20<sup>th</sup> January 2011. That it follows that by the time the Chamber Summons dated 28<sup>th</sup> March 2012 was filed, a period of over one year two months from the date the Appeals Committee decision was read had lapsed. That the appeal for leave was therefore filed outside time.

h) That for the reasons set out above, the Appeals Committee decision, having contravened **Section 8 (3) of the Land Disputes Tribunal Act** and not being based on the award and proceedings of the Siaya Land Disputes Tribunal Case No. 8 of 2004, cannot stand. That likewise the Land Dispute Tribunal award in Case No. 8 of 2004 having been found to be beyond and in excess of the Tribunal Jurisdiction cannot also be allowed to stand, notwithstanding the Appeals Committee decision having been impugned.

i) That the parties herein may opt to discuss the matter concerning the suit land as a family with a view of seeking an out of court settlement. That needless to say, should there be no settlement, the parties are at liberty to seek legal advice on how to pursue or defend their respective interests over the suit land.

8. That following from the foregoing, the Court orders as follows;

**a) That the Nyanza Land Disputes Appeals Committee decision in Case No. 1 of 2009, dated 6<sup>th</sup> October 2010 and read in Siaya PMC Land Case No. 3 of 2007 on the 20<sup>th</sup> January 2011, is hereby called into this court and quashed through an order of Certiorari.**

**b) That the Siaya Land Disputes Tribunal award, in Case No. 8 of 2004 made on the 15<sup>th</sup> November 2006 and read in Siaya PMC Land Case No. 3 of 2007 on the 5<sup>th</sup> April 2007, is equally called to the Court and quashed through an order of Certiorari.**

**c) That each of the parties to bear their own costs in the Tribunal, Appeals Committee and this court.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF MAY 2018

**In the presence of:**

Exparte Applicant Present

Respondents      Absent

Interested Party      Present

Counsel   Mr. Abwa for Ko'winoh for Interested Party

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**