



**REPUBLIC OF KENYA**

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

**ELC JR CASE NO. 15 OF 2017**

**(Formerly Kisii ELC JR Misc No. 40 of 2008)**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

**IN THE MATTER OF LAND DISPUTES TRIBUNALS ACT (ACT NO. 18 OF 1990)**

**AND**

**IN THE MATTER OF MISCELLANEOUS APPLICATION NO.4 OF 2005**

**BEFORE SENIOR RESIDENT MAGISTRATE'S COURT AT RONGO**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHAIRMAN MIGORI DISTRICT LAND**

**DISPUTES TRIBUNAL - AWENDO DIVISION.....RESPONDENT**

**AND**

**JOYCE ALOO RARIGI.....INTERESTED PARTY**

**PETER OTIENO RARIGI (Suing as Legal Representative of Estate of**

**NASHON ODERO – Deceased).....EXPARTE**

**JUDGMENT**

1. On 23<sup>rd</sup> October, 2008, the ex-parte applicant namely **PETER OTIENO RARIGI** suing as legal representative of Estate of **NASHON RARIGI ODERA** - deceased ( the applicant herein) was granted leave of the court to apply for an order of certiorari to quash the decision of Migori District Land Disputes Tribunal Awendo Division and the Judgment of Rongo SRM's court Misc. Application No.14 of 2005 and its decree dated 10<sup>th</sup> March 2008 and for an order of prohibition against the District Land Registrar Migori/Rongo District from implementing the consequent decree of the undated award of the tribunal (respondent). The applicant was further granted an order that the grant of leave to apply for orders of certiorari and prohibition operates as stay of implementation of the award/consequent decree terminating the registration of the applicant as owner of the parcel of land **No. South Sakwa/Kogelo/1005** (the suit land).

2. Pursuant to the grant of leave, the applicant filed an application for judicial review by a Notice of Motion dated 7<sup>th</sup> November 2008 (the application). He sought the following orders :-

**1) THAT the honourable court be pleased to grant an order of Certiorari to remove and bring to High Court for purposes of quashing the undated award of Migori District Land Disputes Tribunal – Awendo Division which award was adopted as decree by Senior Resident Magistrate's court Rongo vide Misc. Application No. 14 of 2005. The said undated award being product of the said Tribunal's Case No. 14 of 2005 terminating the applicant's registration to the suit land.**

2) **THAT the Honourable Court be pleased to grant an order of prohibition directed against the District Land Registrar Migori/Rongo District, prohibiting them from implementing the consequent Decree dated 10<sup>th</sup> March 2008 of the undated Award of the said Tribunal.**

3) **THAT the costs of this application be borne by the third party.**

4) **Any further order as the court may deem just and fit.**

3. The application was anchored on the grounds which include:-

b) The said award/consequent decree is null and void because;

**i. Section 3 of Act No. 18 of 1990 specifically stipulates the jurisdiction of land Dispute Tribunal of which disputes involving Succession of Estate of deceased persons is not stated hence the Tribunal Acted without jurisdiction as matter of succession are exclusively governed by the succession Act.**

**ii. The tribunal further purported to determine matters of title registered under Cap 300 laws of Kenya without jurisdiction.**

**iii. The said tribunal is an illegality in law as it contravenes Section 4 of Act No. 18 of 1990.**

**iv. The holding in the case of De Souza Versus Chairman and members of Tanga town Council 1961 E.A. 377 were not complied with.**

4. The application was further premised on the applicant's verifying affidavit sworn on 7<sup>th</sup> November, 2008 by which he made reference to and relied on the applicant's verifying affidavit and statutory statement filed earlier in support of the application. In his statement, he stated that since 17<sup>th</sup> August 2004, he is the sole registered owner of the suit land. That the respondent arbitrarily awarded the interested party who is his step mother, a portion of the suit land without lawful justification and against the law as the applicant had acquired the suit land through a grant of valid letters of administration. He further stated that the respondent heard and determined a succession matter on allegations of fraud without jurisdiction. Consequently that the respondent's decision was filed in Rongo SRM's Misc. application No. 14 of 2005 and adopted as judgment of the court on 10<sup>th</sup> March, 2005 hence provoking the instant application.

5. The respondent and the interested party were duly served. They never filed any response to the application.

6. On 21/6/2017, the court directed that the application be heard by way of written submissions. The applicant's learned counsel, Mr. Kiseru filed submissions dated 15<sup>th</sup> March 2018, and urged the court to allow the application by grant of the orders sought therein. He relied on Kisii ELC Misc. Application No. 35 of 2012, Republic -v- The Land Disputes Tribunal -Kisumu and SRM. Oyugis and Charles Otieno Onyango Exparte Fanuel Okoth Onyango.

7. I have considered the entire application and submissions by the applicant's counsel. The issues for determination are whether:-

**a) The respondent had jurisdiction to hear and determine the land dispute between the applicant and the interested party.**

**b) The respondent acted in excess of jurisdiction in the dispute.**

**c) The applicant is entitled to the orders sought herein.**

8. It is trite law that jurisdiction of a court or tribunal flows from either the Constitution or statute or both. In Samwel Kamau Macharia & Anor -v- Kenya Commercial Bank & 2 others (2012) eKLR, the Supreme Court of Kenya, pronounced itself thus:-

**"A court's jurisdiction flows from either the Constitution or legislation or both thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."**

9. The Land Disputes Tribunals Act No. 18 of 1990 (repealed Act) governed the jurisdiction of the Land Disputes Tribunals, including the respondent. Section 3 (1) of the repealed Act read:-

**" (1) subject to this Act, all cases of 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;**

**c) Trespass to land.**

**Shall be heard and determined by a tribunal established under section 4.**

10. This court has noted that the interested party and the applicant were the complainant and objector respectively in land case No. 14 of 2005 which was heard and determined by the respondent. The dispute bordered on occupation and ownership of a portion of the suit land. On one hand, the interested party claimed that the applicant had falsely acquired the suit land and denied her (interested party) cultivation of the suit land belonging to her late husband, Nashon Rarigi Odero. On the other hand, the applicant claimed that the suit land was given to him by his late father, who instructed him to take care of the interested party and his (applicant's) mother. That the interested party had leased the land many times to many people.

11. The respondent heard and determined the land dispute in favour of the interested party. The respondent made an award and held in part that :-

**“The tribunal therefore felt that the objector should surrender Rarigi’s certificate whose transfer to him was disputed before the Land Tribunal Board so that the following buyers get their share of what they bought John Owuor Anindo 4 acres, Peter Olewe Osunga 1 acres, William Olima Osunga 2 acres and Owino Akunya ½ acres. The remaining portion of Rarigi’s land should be cautioned at the Land Registrar’s Office.”**

12. The respondent award was filed in Rongo SRM’s court which entered judgment and issued a decree in accordance with Section 7 of the repealed Act which then provided as follows:-

**“(1) the chairman of the tribunal shall cause the decision of the tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or provided before the tribunal.**

**(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”**

13. The court’s decree, title deed to the suit land and land registrar’s letter marked POR 2,3, and 4 respectively accompany the application. It is clear from record of proceedings of the respondent and the entire application that the respondent did entertain a dispute relating to title of the suit land, a matter which did not fall within **Section 3 (1) of the repealed Act**. The respondent’s decision was a nullity ab initio as cancellation of the title to the suit land was then a preserve of the High court.

14. In the case of **Kimote Musau –v- Makumi Mulura Muthwethau & 2 others (2015) eKLR**, the Court of Appeal cited the court’s earlier decision in **Kenya National Examinations Council –v- Republic Ex-parte Godfrey Gathenji Njoroge & 9 others (1997) eKLR** that an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of Natural Justice are not complied with or just like reasons. The court further held that :-

**“An order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons....**

15. It is well settled law that jurisdiction is everything; see **Owners of Motor Vessel Lilian “S” –V- Caltex Oil Kenya Ltd (1989) KLR 1**.

16. In the instant matter, the respondent dealt with issues pertaining to title of the suit land. The respondent decision and the subsequent judgment together with decree issued thereof, were made without or ultra vires its jurisdiction thus lack any meaning. In **Daniel Kaloki Kioko & anor –v- Willy Muasya Kioko (2009), eKLR, Lenaola J** (as he then was).

**“There is nothing more to say as where jurisdiction is wanting all other issues cannot have any meaning.”**(Emphasis added).

17. I endorse the point of view by Mutungi J in **Republic –v- Land Disputes Tribunal – Kisumu Ex- parte Fanuel Okoth Onyango case (supra)** in respect of the court’s protection of the cause of justice. The learned Judge held inter alia:-

**“Nothing comes out of nothing. This court exercises supervision over the tribunals and the subordinate courts whose decisions relate to matters in regard to which this court has jurisdiction over and will not permit or allow the cause of justice to be perverted.”**

18. In light of the foregoing analysis, I find that the applicant has made out a sound case that he is entitled to the orders sought in the application.

19. A fortiori, the application dated 7<sup>th</sup> November, 2008 is merited and I grant orders of certiorari and prohibition sought therein with no orders as to costs.

**DELIVERED, SIGNED and DATED** in open court at MIGORI this 8<sup>th</sup> day of MAY, 2018

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of;**

Mr. Kiser learned counsel for plaintiff.

Tom Court Assistant