



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KISUMU**

**E.L.C –J.R. NO. 20 OF 2017**

**(FORMERLY KISUMU HC MISC. APPLICATION NO. 3 OF 2011 (J.R.)**

**IN THE MATTER OF AN APPLICATION BY JOSEPH OUMA OREGA AND VITALIS**

**OTIENO OREGA FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF LAND PARCEL NO. NORTH UGENYA/SIMUR/1280**

**AND**

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

**AND**

**IN THE MATTER OF THE NYANZA PROVINCIAL APPEALS COMMITTEE**

**AND**

**IN THE MATTER OF AN APPEAL FROM SIAYA DISTRICT**

**LAND DISPUTES TRIBUNAL CASE NO. 16 OF 2004**

**BETWEEN**

**JOSEPH OUMA OREGA.....1<sup>ST</sup> APPLICANT**

**VITALIS OTIENO OREGA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE NYANZA PROVINCIAL LAND APPEALS COMMITTEE.....RESPONDENT**

**AND**

**HELIDA AWINO WAGUMBA.....INTERESTED PARTY**

**JUDGMENT**

By a Notice of Motion dated 24<sup>th</sup> January, 2011 the Ex parte Applicants herein Joseph Orega and Vitalis Otieno Orega sought for leave to apply for an order of mandamus to compel the Nyanza Provincial Appeals Committee to hear and determine the appeal arising from the defunct Siaya District land Tribunal. The court granted the leave which also served as a stay of the implementation of the decision of the Siaya Land disputes Tribunal Case No. 16 of 2004

The Applicants after obtaining such leave filed the current application dated 25<sup>th</sup> January 2011 in the then Kisumu HC Misc. Application **No. 3 of 2011** (before it was re-numbered as Kisumu ELC – JR **No. 20 of 2017**, whereby the Applicants sought orders of mandamus to compel the then Nyanza Provincial Appeals Committee to hear and determine their appeal arising from Siaya District Land Disputes Tribunal Case No. 16 of 2004.

When this matter came up for hearing Counsel for the Respondent Miss Langat informed the court that the respondent had already conceded to the matter with no orders as to costs which was confirmed by Counsel for the Ex parte applicant Mr. Moses Orengo.

Wasuna and Co Advocates for the interested party were not present but Mr. Orengo informed the court that they had agreed to canvass the matter by way of written submission and that the supporting and replying affidavits were in the court records. Counsel for the Ex parte Applicant filed written submissions but the interested party did not file any within the stipulated period.

### **Ex parte Applicant's Submissions**

It was Counsel's submission that the award of the Siaya District Land Disputes Tribunal in Case No. 16 of 2004, was made on 21<sup>st</sup> September, 2004, and in it the said tribunal directed or ordered the District Land Registrar, Siaya, to cancel the title deed for land parcel No. North Ugenya/Simur/1280 and have the same land re-surveyed and that a portion be awarded to one Cornel Wagumba Oloo.

Mr. Moses Orengo Counsel for the Applicant further submitted that at that time the said land parcel No. North Ugenya/Simur/1280 was registered in the joint names of Joseph Ouma Orega and Vitalis Otieno Orega, the Applicants herein, who were aggrieved by the cancellation of their title deed and therefore appealed to the defunct Nyanza Provincial Appeals Committee. Counsel stated that one year down the line the appeal to the Nyanza Provincial Appeals Committee had not been heard, as confirmed by the letter dated 1<sup>st</sup> November, 2005, from the Provincial Commissioner, Nyanza, to the District Commissioner, Siaya.

Counsel also submitted that this delay is what prompted the applicant to file the Notice of motion in 2011 vide Misc. Application No. 3 of 2011 to compel the then Nyanza Provincial Appeals Committee to hear and determine their appeal. It is on record that before the application could be heard, the Nyanza Provincial Appeals Committee was disbanded upon the repeal of the Land Disputes Tribunal Act (No. 18 of 1990) and that **The Environment and Land Court Act (No. 19 of 2011)** came into effect on 30<sup>th</sup> August, 2011 giving it jurisdiction to determine the pending appeal.

Mr. Orengo also submitted that the **Chief Justice** thereafter issued Practice Directions as contained in Gazette Notice No. 16268 dated 9<sup>th</sup> November, 2012, as follows: "11. *Appeals from the Magistrates Courts and Tribunals in the foregoing paragraphs 5 to 10 shall lie in the Environment and Land Court pursuant to Section 13 (4) of the Environment and Land Act.*"

Counsel gave a background to the case and how it was transferred to the High Court for hearing and determination. It was Counsel's submission that there were four issues which were framed and filed in court on 5<sup>th</sup> June, 2017, as follows:

1. Whether the dispute before the Siaya District Land Disputes Tribunal in Case No. 16 of 2004 was a dispute relating to title to land, and if so whether such a dispute was within the ambit of the powers conferred upon the said Tribunal by Section 3 (1) of the Land Disputes Tribunals Act, No. 18 of 1990.
2. Whether the Siaya District Land Disputes Tribunal in Case No. 16 of 2004 had jurisdiction to order that the Title Deed for land parcel No. North Ugenya/Simur/1280 registered in the joint names of the Applicants be cancelled and that the said parcel of land be re-surveyed and sub-divided.
3. Whether decision and award of the said Siaya District Land Disputes Tribunal in Case No. 16 of 2004 as well as the decree issued in Siaya SRMC Misc. Application No. 28 of 2004 were made without jurisdiction and if so, whether the said decision and award as well as the decree should be declared null and void.
4. Whether the register for land parcel No. North Ugenya/Simur/1280 should be restored to the names of Joseph Ouma Orega and Vitalis Otieno Orega as joint proprietors.

It was further Counsel's submission that at all material times the 1<sup>st</sup> and 2<sup>nd</sup> Applicants were the joint registered proprietors of land parcel No. North Ugenya/Simur/1280 since 29<sup>th</sup> September, 2003 and that the evidence on record shows that the two of them inherited this parcel of land from their father, the late Nicholas Orega Olando, and that they held the title for themselves as well as for their youngest brother, Fredrick Owino Orega, in addition to the family and children of their eldest brother, the late Gabriel Olando Orega. He also stated that the evidence further discloses that in the year 2004, one Cornel Wagumba Oloo, the deceased husband of the Interested Party herein, lodged a claim against both the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein in the defunct Siaya District Land Disputes Tribunal Case No. 16 of 2004, in which he claimed to be entitled to a share of this parcel of land.

That the Siaya District Land Disputes Tribunal in Case No. 16 of 2004, heard the claim and ordered that "*The Land Registrar is hereby ordered to cancel the Title No. 1280 and have the same land re-surveyed and the claimant Wagumba's portion separated and given its own registration number. The remaining land be registered in the names of Joseph Ouma Orega and Vitalis Otieno Orega as before.*"

Pursuant to that award of the said Siaya District Land Disputes Tribunal in Case No. 16 of 2004, **Siaya SRMC Misc. Civil Case No. 28 of 2004** later adopted the same as the judgment of the court and made into a decree. Counsel submitted that the District Surveyor, confirmed vide a letter dated 10<sup>th</sup> April 2012 that the disputed parcel of land was thereafter sub-divided as directed by the tribunal and the court.

Mr. Orenge Counsel for the applicant also submitted that the award of the tribunal was fully implemented and the District Land Registrar, Siaya, made an entry in the register as follows: "Title cancelled vide Gazette Notice No. 8492 of 14/08/09 and court order No. 28 of 2004" (See entry No. 4 dated 29<sup>th</sup> September, 2003 in the Green Card annexed to the application dated 19<sup>th</sup> July, 2012). It was his submission that the Siaya District Land Disputes Tribunal in case No. 16 of 2004 had no jurisdiction to award any portion of the said land parcel No. 1280 to the said Cornel Wagumba Oloo, or to order that the title deed be cancelled or be sub-divided.

He further submitted that the tribunal's order to cancel the Applicants' title deed, to have the disputed parcel of land re-surveyed and to award a portion of the said parcel of land to the Interested Party confirms that the proceedings before the Siaya District Land Disputes Tribunal in Case No. 16 of 2004 related to title to land, and such a dispute was not within the provisions of Section 3 (1) of the then Land Disputes Tribunals Act, No. 18 of 1990 (now repealed), and therefore the said Tribunal did not have jurisdiction to determine such a dispute.

Counsel cited the case of **Owners of the Motor Vessel "Lillian S" – Vs – Caltex Oil (Kenya) Ltd** [1989] 1, at page 14:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings....."

He further relied on the Kisumu Court of Appeal Civil Appeal No. 157 of 2001 (**Asman Maloba Wepukhulu & AWycliffe Barasa – Vs – Francis Wakwabubi Biketi**), where a panel of elders had "*cancelled the title in favour of the respondent and ordered that the suit land be sub-divided amongst the sons of the deceased,*" the Court of Appeal held that they had no jurisdiction to do so. Similarly, in Kisumu Court of Appeal Civil Appeal No. 256 of 2002 (**Jotham Amunavi – Vs – The Chairman Sabatia Division Land Disputes Tribunal & Enos Kenyani Amunavi**), the claimant "*claimed that Jonathan took his share of family land and included it in his title. He claimed a portion of the suit land.*" The Sabatia Land Disputes Tribunal ordered that "*the land be sub-divided into two portions of 1 acre and ½ acre thereby the plaintiff should occupy ½ acre.*"

The Court of Appeal had this to say:

"The implementation of the decision of the tribunal entails the sub-division of the suit land into two parcels and opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre to Kenyani (see section 89 of the RLA).

It is clear that the proceedings before the tribunal related both to title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of Section 3 (1) of the Land Disputes Tribunals Act. By Section 159 of the RLA, such a dispute can only be tried by the High Court or by the Resident Magistrate's court in cases where such latter court had jurisdiction."

Counsel therefore urged the court to find, hold and declare that the decision and award of the Siaya District Land Disputes Tribunal in Case No. 16 of 2004 as well as the decree in Siaya SRMC Misc. Civil Case No. 28 of 2004, were grossly in excess of jurisdiction, and therefore ought to be nullified forthwith. Further that the District Land Registrar therefore also acted in excess of the statutory jurisdiction in purporting to implement the award of the tribunal and the court order. Counsel further reiterated that the state Counsel had conceded to the appeal.

### **Analysis and Determination**

The issues for determination in this Appeal are as framed above by the Ex parte applicant but the bottom line is the issue as to whether Siaya Land Disputes Tribunal Case No. 16 of 2004 was a dispute relating to title to land, and if so whether such a dispute was within the ambit of the powers conferred upon the said Tribunal by Section 3 (1) of the Land Disputes Tribunals Act, No. 18 of 1990.

From the above chronology of events that took place at the tribunal and later the adoption of the award as a judgment of the court, it is clear that the dispute was in respect of title to land. That is the reason why the tribunal gave specific orders for sub division, transfer and registration of the suit parcel of land in the name of the interested party.

When a subdivision is done, there are new numbers given, opening of registers and transfer of the subdivided portions. This means that it involves the issue of title to land. When the Tribunal gave the award with the following terms, "*The Land Registrar is hereby ordered to cancel the Title No. 1280 and have the same land re-surveyed and the claimant Wagumba's portion separated and given its own registration number. The remaining land be registered in the names of Joseph Ouma Orega and Vitalis Otieno Orega as before.*" It had assumed the role of the High Court which had the jurisdiction to handle such claims.

The establishment of the Land Disputes Tribunal was a noble idea which was meant to ease the litigants' agony with land disputes but the same was abused by the panellists who became 'drunk' with power. Some panellists worked well for the litigants but some brought more pain and confusion in handling land matters. They overstepped their well-documented mandate and started competing with the High court and giving illegal awards.

It is well settled that jurisdiction is everything and the moment a court or tribunal realizes that it lacks the same, then it should down its tools and not make a step further to do injustice. Section 3 (1) of the Land Disputes Tribunals Act, No. 18 of 1990 (Now Repealed) is very clear on the matters that the tribunal could handle. The Act prohibited the tribunal from hearing matters touching on title to land. I therefore find that the tribunal had no jurisdiction to hear and order for the resurvey and cancellation of title. They surely overstepped their mandate and acted ultra vires.

Further the tribunal went ahead to direct the District Land Registrar to resurvey, cancel the suit parcel of land and register in the name of the interested party herein.

Having found that the Siaya Land Disputes Tribunal acted in excess of its mandate it follows that the award that they rendered was null and void and any other subsequent action for adoption by the Siaya SRMCC No 28 of 2004 was also null and void.

I also find that the Land Registrar's action of implementing the above orders was also without legal basis and was therefore a nullity.

In the case of Republic –vs- Chairman Borabu Land Disputes Tribunal & 2 Others ex parte Florence Nyaboke Machani [2014] eKLR, Okong'o J. considering an application similar to the one before me observed thus:-

“Now the decision of the 1st respondent was null and void, was there anything that the 2nd respondent could adopt as a judgment of the court? 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;

“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 the 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 incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

I am of the view that since the decision of the 1st respondent was a nullity, there was nothing in law that could be filed before the 2nd respondent for adoption as a judgment of the court. Such judgment would equally be a nullity. I am of the view that section 7 of the Land Disputes Tribunal Act pursuant to which the decision of the 1st respondent was lodged with the 2nd respondent for adoption envisaged a lawful decision by the 1st respondent. Since the decision of the 1st respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 2nd respondent could enter judgment and issue a decree.”

I am in agreement with the views above by the learned Judge and that being the case, I conclude that the orders sought for have merit.

The appeal is hereby allowed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants with a further order that entries Nos. 4, 5 and 6 in the register for land parcel No. North Ugenya/Simur/1280 be cancelled and expunged and the title deed restored to the joint names of Joseph Ouma Orega and Vitalis Otieno Orega.

**DATED and DELIVERED at KISUMU this 30<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**M. A. ODENY**

**JUDGE**

**JUDGMENT READ, and SIGNED** in open court in the presence of;

Mr. Moses Orongo for the Exparte Applicant Appellant, court assistant Joanne, and in the absence of the Respondent and the Interested Party,

**M. A. ODENY**

**JUDGE**