



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

J.R. 19 OF 2017

[FORMERLY H.C.J.R.22 OF 2012]

IN THE MATTER OF AN APPLICATION BY JOHN OUKO ONYANGO FOR LEAVE TO

APPLY FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF PARCEL NUMBER, KISUMU /NYHERA/1107 AND 2020

AND

IN THE MATTER OF KISUMU CHIEF MAGISTRATE'S COURT LAND CASE NO.86 OF 2011

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KISUMU EAST DISTRICT LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

KISUMU CHIEF MAGISTRATE.....2ND RESPONDENT

AND

PAUL ANDIEGO NELSON ANDIEGO.....INTERESTED PART

VERSUS

JOHN OUKO ONYANGO.....EX-PARTE APPLICANT

VERSUS

GEORGE OTEINO JUMA.....DEFENDANT

JUDGMENT

1. **John Ouko Onyango**, the exparte Applicant, filed the notice of motion dated 2nd May 2012 seeking for an order of certiorari to bring to this court the decision of Kisumu East Land Disputes Tribunal case No.40 of 2011 and Kisumu C.M.C Land Case No.86 of 2011 four quashing. He also prays for costs. The notice of motion is based on four grounds marked (i) to (iv) on its face and supported by the statement of facts and verifying affidavit dated and sworn on 19th April 2012. The application names Paul Andiego Nelson Andiego as the Interested Party while Kisumu East Land Disputes Tribunal and the Chief Magistrate's Kisumu are named as the 1st and 2nd Respondents respectively.

2. The notice of motion came up for mention on the 2nd October 2013. Mr. Kirenga, M/S Langat and Mr. Ochieng were present for the Exparte Applicant, Respondents and Interested Party respectively. The counsel for the Respondents and Interested Party informed the court that they had instructions to concede to the notice of motion so long as they are not condemned to costs. The court therefore directed the Exparte Applicant and Interested Party to file submissions on costs.

3. The Exparte applicant filed their written submissions dated 25th October 2013 while the Interested Party filed their's dated 8th May 2017.

4. The issue for determination is primarily one; that is which party should pay the costs.

5. The court has carefully considered the pleadings filed, written submission and come to the following conclusions;

a) That the copy of the Kisumu East District Land Dispute Tribunal case No.40 of 2011 confirms that Paul Andiego

Nelson Andiego, the Interested Party herein, was the one who initiated the proceedings as the claimant against Nereah Daudi Onyango and John Aoko Onyango, the Exparte Applicant herein.

b) That the Interested Party's claim before the tribunal was over land parcels **Kisumu/Nyahera/1107** and 2010 which he claimed belonged to his grandfather, but which the objectors had taken. The Interested Party's prayer was that he be allowed to retain the land. That the tribunal ruled that land parcel **Kisumu/Nyahera/1107** "be given back to Semo's family i.e. Paul Andiego Andiego, the claimant heirs." That the tribunal also ruled that the objectors (including Exparte Applicant) retains Kisumu/Nyahera/2010 but they pay the balance of the purchase price to the Interested Party (claimants).

c) That the tribunal's award was adopted in Kisumu Chief Magistrate's Court Land case No.86 of 2011 on the 23rd December 2011 as confirmed by the copy of the order annexed to the application.

d) That the findings in (a) to(c) above confirms that it was the Interested Party who had initiated the proceedings before the forum that was without jurisdiction. That the award made thereof prompted the Exparte Applicant to challenge the tribunal in award in this court on the ground of jurisdiction among others.

e) That the Interested Party conceded to the application to have the tribunal award and the lower court's adoption order quashed but submitted that he should not be condemned to pay costs as "the decision of the tribunal to exceed its jurisdiction was not within his control." [See paragraph 6 of

the Interested Party's Counsel submissions]. That though the issue of the tribunal's jurisdiction on the dispute filed by the Interested Party was not addressed during the initial hearing, the tribunal would not have made the award in dispute had it not been moved, as it was, by the Interested Party.

f) That inevitably the act of the Interested Party of filing his claim before a forum without jurisdiction is the one which made the Exparte Applicant file this proceedings and under **Section 27** of the Civil Procedure Act, he is entitled to costs as the victorious party. The Interested Party and the Respondents act of conceding to the notice of motion only ensured the proceedings were not protracted hence reducing the costs due to the fewer court attendances.

g) That as the notice of motion is conceded by both the Respondents and Interested party, the same is hereby granted as prayed.

6. That for reasons set out above, the notice of motion dated 2nd May 2012 has merit and is allowed as follows:

a) That an order of certiorari is hereby issued calling into this court quashing the award in Kisumu East District Land Disputes Tribunal in case No.40 of 2011 and the adoption order in Kisumu Chief Magistrate's Court Land Case No.86 of 2011 forthwith.

b) That the interested party will pay the Exparte Applicant costs.

c) That the file be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2017

In presence of;

Exparte Applicant Present

Respondents Absent

Interested Party Absent

Counsel Mr. Kwenga for Exparte Applicant

Mr Ochieng for Interested Party.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017

S.M. Kibunja Judge

Oyugi/Joane court assistant

Exparte Applicant present

Mr. Ochieng for Interested party

Mr. Kwenga for Exparte Applicant

Court: Judgment dated and delivered in open court in the presence of
exparte Applicant and Mr. Ochieng for Interested Party.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017

Order: File be closed.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

27/9/2017