



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT AT KISII**  
**PETITION NO. 82 OF 2011**

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL HIGH COURT  
PRACTICE AND PROCEDURE RULES 2006 ARTICLE 262 (19) OF THE TRANSITIONAL  
AND CONSEQUENTIAL PROVISIONS**

AND

**IN THE MATTER OF ARTICLE 21 (1), 22 (3) c, 23 (1) AND (3), 24 (1) d, e, 25 (c), 27 (1) and (2),  
28, 29 (a), 39, 40 (2) a and b, 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

JOSEPH OGINGA ONYONI ..... 1<sup>ST</sup> PETITIONER

N N ..... 2<sup>ND</sup> PETITIONER

AGNES KERUBO ONYONI ..... 3<sup>RD</sup> PETITIONER

AND

HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

NYAMARAMBE LAND DISPUTES TRIBUNAL ..... 2<sup>ND</sup> RESPONDENT

REUBEN OYONDI ONSERIO ..... 3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The 3<sup>rd</sup> respondent following a decision/award of Etago Land Disputes Tribunal Case No. 37 of 2011 was awarded part of land parcel **South Mugirango/Boikanga/244** (hereinafter referred to as “the suit property”) vide an award made on 24<sup>th</sup> August, 2011. This award was adopted by the Principal Magistrate’s Court at Ogembo vide Misc. App. No. 32 of 2011 on 8<sup>th</sup> November 2011 and a decree issued in terms of the award. The net effect of the decree was to award the 3<sup>rd</sup> respondent part of land parcel **South Mugirango/244** then registered in the petitioners’ deceased father’s names.

2. The petitioners have brought the present petition dated 5<sup>th</sup> December 2011 and filed in court on 7<sup>th</sup> December 2011. By the petition the petitioners aver they are the registered owners of the suit property and contend that the 2<sup>nd</sup> respondent had no jurisdiction to order the cancellation of the title to the suit property under the **Land Disputes Tribunal Act No. 18 of 1990** and thus aver the decision of the

tribunal was null and void for want of jurisdiction and that this court should set the same aside. The petitioners aver the 2<sup>nd</sup> respondent's award of the suit property to the 3<sup>rd</sup> respondent contravened the petitioners constitutional rights to property as stipulated in article 40 (2) of the Constitution which guarantees land property rights of every person. The petitioners seek the following reliefs pursuant to the petition:-

**(a) That the honourable court be pleased to declare null and void and set aside the Nyamarambe land disputes tribunal's award dated 30<sup>th</sup> August 2011 as adopted as judgment of the principal magistrate court Ogembo on the 25<sup>th</sup> October, 2011.**

**(b) Costs of the petition be provided or in favour of the petitioner.**

3. The petitioners were granted leave to amend the petition and on 21<sup>st</sup> August 2013 filed an amended petition dated the same date. The amended petition pleaded that the suit property had been subdivided into LR No. 2618 and was now registered in the name of the 3<sup>rd</sup> respondent. In the amended petition the petitioners averred that the 2<sup>nd</sup> respondent in dealing with the dispute dealt with matters relating to succession, the **Land Control Act, Limitation of Actions Act** and the **Registered Land Act** which they had no jurisdiction to deal with. By the amended petition the petitioners sought the following reliefs:-

**(i) That the honourable court be pleased to declare null and void and set aside and/or grant an order of judicial review in the form of certiorari to bring to the high court and quash the Nyamarambe Land Disputes Tribunal's Award dated 30<sup>th</sup> August 2011 as adopted as judgment of the Senior Resident Magistrate Court Ogembo on the 25<sup>th</sup> day of October 2011 with all its consequential orders, and order cancellation of LR Number South Mugirango/Boikangaa/2618 and the same reverts back to the original LR Number South Mugirango Boikang'aa/244.**

**(ii) That an order of injunction and/or eviction to restrain and/or evict the 3<sup>rd</sup> respondent permanently from LR No. South Mugirango/ Boikang'aa/244 and/or 2618.**

4. The petition was supported by the affidavit sworn in support by the 1<sup>st</sup> petitioner on 2<sup>nd</sup> December 2011 and the subsequent affidavit sworn in support of the amended petition dated 21<sup>st</sup> August 2013. The affidavits in support reiterate the averments contained in the petition contending that the 2<sup>nd</sup> respondent acted in excess of its jurisdiction and the award it rendered was a nullity and could therefore not confer any rights to the 3<sup>rd</sup> respondent.

5. The 3<sup>rd</sup> respondent filed a replying affidavit sworn on 26<sup>th</sup> January 2015 in response to and in opposition to the amended petition dated 21<sup>st</sup> August 2013. The affidavits in support reiterate the averments contained in the petition contending that the 2<sup>nd</sup> respondent acted in excess of its jurisdiction and award it rendered was a nullity and could therefore not confer any rights to the 3<sup>rd</sup> respondent.

6. The 3<sup>rd</sup> respondent filed a replying affidavit sworn on 26<sup>th</sup> January 2015 in response to and in opposition to the amended petition dated 21<sup>st</sup> August 2013. The 3<sup>rd</sup> respondent through the replying affidavit states that she is the registered owner of land parcel **South Mugirango/Boikanga/2618** which resulted from the subdivision of land parcel **South Mugirango/ Boikanga/244**, she avers that the petitioners had gotten registered owners of land parcel **South Mugirango/Boikanga/244** through dubious means without following due process and upon such registration wanted to evict her from the portion of **parcel 244** which she was occupying and in possession of having purchased the same in 1975 from Nyasimi Munyore and Onyoni Manyore (both now deceased) who were the joint registered owners of land parcels **South Mugirango/Boikanga/244** as evidenced by a copy of abstract of title annexed and marked **"R00-1"**.

7. The 3<sup>rd</sup> respondent further depones that the 1<sup>st</sup> and 3<sup>rd</sup> petitioners in 2009 invaded the suit land and

chased away the 3<sup>rd</sup> respondent's agents from her portion of the land and this prompted the filing of the case before the Land Disputes Tribunal which resulted in the tribunal's award which was endorsed and adopted by the Ogembo Magistrate's Court and a decree issued. The tribunal proceedings and award including the court decree are together annexed and marked "**R00-02**". The 3<sup>rd</sup> respondent further avers that when the petitioners obtained registration of the suit property in their names they had not obtained any grant of letters of administration through a succession cause to the estates of Nyasimi Manyore and Onyoni Manyore and in consequence their registration as owners was illegal and unlawful.

8. The 3<sup>rd</sup> respondent states she was duly awarded the land by Land Disputes Tribunal and that the award was given effect and implemented by the court at Ogembo and that she is now properly registered as owner of land parcel **South Mugirango/Boikanga/2618** as per the copy of the title deed annexed and marked "**R00-3**". The 3<sup>rd</sup> respondent reiterates that having purchased a portion of land parcel 244 with her father from Nyasimi Manyore (deceased) and Onyoni Manyore (deceased) they were entitled to a portion of the land parcel 244 and this is what the land tribunal granted her. The 3<sup>rd</sup> respondent prays that the petitioners petition be struck out and/or be dismissed with costs.

9. Although the parties had agreed to have the petition heard by way of oral evidence as per the directions given by the court on 10<sup>th</sup> December 2014 when the parties appeared before me on 4<sup>th</sup> November 2015 for hearing the parties opted to have the petition heard by way of written submissions. Directions were given for the parties to exchange written submissions. The petitioners submissions dated 6<sup>th</sup> January 2016 were filed on 7<sup>th</sup> January 2016 while the 3<sup>rd</sup> respondent's submissions dated 20<sup>th</sup> April 2016 were filed on 21<sup>st</sup> April 2016. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' in spite of filing a memorandum of appearance on 24<sup>th</sup> October 2013 did not file any response and/or any submissions.

10. Having reviewed the petition and the response thereto and the submissions filed by the parties the issues that emerge for determination by the court as follows:-

**(i) Whether the land disputes land tribunal had jurisdiction to entertain the dispute filed before it and whether the parties before it had capacity to bring the claim and/or defend the same.**

**(ii) Whether the petitioners had validly been registered as owners of land parcel South Mugirango/Boikanga/244.**

**(iii) Whether the Ogembo SPM's court could validly adopt and give effect to the award of the land disputes tribunal.**

**(iv) Whether the petitioners are entitled to the reliefs sought in the petition.**

11. The land disputes tribunal during the hearing of the case made findings that land parcel **South Mugirango/Boikang'a/244** was registered in the names of Nyasimi Manyore and Onyoni Manyore who had died. The tribunal further found that the 3<sup>rd</sup> respondent's father one Jonathan Onserio also deceased had bought land from the deceased and awarded the 3<sup>rd</sup> respondent as the son of the said Jonathan Onserio a portion of land **South Mugirango/Boikanga/244** measuring 426ft by 252ft by 426ft by 242ft which was to be excised from the said land. It is this award by the tribunal that was adopted by the Ogembo Court and was given effect resulting in the subdivision of land parcel **South Mugirango/Boikanga/244** to give rise to parcel **South Mugirango/Boikanga/2618** which was transferred to the 3<sup>rd</sup> respondent. Quite evidently therefore the tribunal dealt with the issue relating to ownership of and title in respect of land parcel **South Mugirango/Boikanga/244**. Further the evidence before the tribunal reveals that both the petitioners and the 3<sup>rd</sup> respondent were litigating on behalf of deceased persons yet none of them demonstrated they had obtained grant of letters of administration to represent the deceased persons. There is therefore the issue whether or not the parties possessed the requisite locus standi to represent the deceased parties. The petitioners have submitted that the 3<sup>rd</sup> respondent lacked the capacity to represent his deceased father he having not taken out letters of

administration.

12. On the question as to whether or not the land disputes tribunal had jurisdiction to deal with the matter that was before it one has to look at Section 3 (1) of the repealed **Land Disputes Tribunals Act** which provided as follows:-

**3(1) Subject to this act, 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.**

The Land Disputes Tribunal could only exercise jurisdiction in regard to matters that it had been conferred jurisdiction under the aforesaid Section 3 (1) of the Act to deal with. The tribunal did not have jurisdiction to deal with title to registered land. That is what the tribunal in the instant case did and by doing so it clearly acted in excess of its jurisdiction. Courts have repeatedly held that the Land Disputes Tribunal's established under Section 4 of the **Land Disputes Tribunal Act No. 18 of 1990** lacked jurisdiction to deal with title and that any resultant awards in cases where the tribunals made decisions touching on title to registered land such awards were a nullity. See the cases of **Wilson Wokabi –vs- Josephine Gatheru Njanya [2007] eKLR**, **Msambweni Land Disputes Tribunal & Another –vs- Bakari Ali Mwakumanya [2014] eKLR** and **Republic –vs- Chairman Land Dispute Tribunal Nambale, ex parte John Okiru Agwata [2010] eKLR**.

13. This court in the case of **Republic, ex parte Peter Nicholas Mautia –vs- Keumbu Land Disputes Tribunal & 2 others [2016] eKLR** has had occasion to consider the application of Section 3 (1) of the **Land Disputes Tribunal Act** and the extent of jurisdiction of the tribunals and in making its determination observed thus:-

**“16. In the present matter the Tribunal’s decision went beyond what is contemplated under Section 3 (1) of the Land Disputes Act. The decision as demonstrated by the attempts to execute the same affected title to land parcel 705 owned by the applicant. It was not merely the issue of a boundary dispute as it entailed the actual subdivision of the parcels of land as exemplified by the copy of the mutation form which indicates the parcel was to be subdivided into two portions and would thus entail the transfer of a portion of the land that definitely would affect the title to parcel 705. This is exactly what the Tribunal lacks the jurisdiction to do pursuant to Section 3 (1) of the Land Disputes Tribunal Act. The decision that emanated from the Land Disputes Tribunal was of no consequence and was a nullity”.**

14. In the present matter the Tribunal made an award which definitely affected the land title **South Mugirango/Boikanga/244** which award the 3<sup>rd</sup> respondent went ahead to have endorsed and adopted by the court and the decision implemented and as a consequence the suit land was subdivided to create parcel 2618 now registered in the 3<sup>rd</sup> respondent's name. The decision by the tribunal was in excess of its jurisdiction and therefore null and void. If the decision by the tribunal was null and void was there anything for the magistrate's court to adopt and give effect to? In the case referred to above, this court answered such a question in the negative and found support in the case of **Republic –vs- Chairman Borabu Land Disputes Tribunal & 2 Others ex parte Florence Nyaboche Machani [2014] eKLR** where Okong'o J held thus:-

**“Now the decision of the 1<sup>st</sup> respondent was null and void, was there anything that the 2<sup>nd</sup> 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 1<sup>st</sup> respondent was a nullity, there was nothing in law that could be filed before the 2<sup>nd</sup> 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 1<sup>st</sup> respondent was lodged with the 2<sup>nd</sup> respondent for adoption envisaged a lawful decision by the 1<sup>st</sup> respondent. Since the decision of the 1<sup>st</sup> respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 2<sup>nd</sup> respondent could enter judgment and issue a decree.”**

15. A similar scenario as the one the learned judge dealt with obtains in the present matter and I would state that the observations as set out by the judge would apply in equal force to the facts and circumstances of the present case. The 2<sup>nd</sup> respondent acted without jurisdiction and hence the magistrate’s court could not properly endorse and enter judgment in respect of an award that was null and void. There was no valid award that the magistrate’s court could have given effect to. The award by the tribunal was a nullity and so was the endorsement of the same as judgment and decree of the court.

16. On the issue whether the parties who appeared before the disputes tribunal had the locus to appear in regard to a dispute relating to the suit property, my view is that they did not. The petitioners before the tribunal stated the subject land was owned by Nyasimi Manyore and Onyoni Manyore (both deceased) through whom they claimed the land. On the other hand the 3<sup>rd</sup> respondent was claiming a portion of the land on the basis that his late father Mzee Jonathan Onserio (deceased) had purchased a portion of the suit property in 1975 from the deceased registered owners. At the tribunal no party had taken out grant of letters of administration to represent and/or act for the estate of any of the deceased persons.

17. The evidence available from the record shows Onyondi Onserio father to the 3<sup>rd</sup> respondent died on 7<sup>th</sup> August 2008 aged 103 years as per the annexed death certificate. The abstract of title annexed in respect of land parcel **South Mugirango/Boikanga/244** shows that Onyoni Manyore and Nyasimi Manyore were registered as joint owners on 1<sup>st</sup> November 1970. Although it is admitted both are deceased there is no evidence on record to show when they died. The abstract of title however shows Joseph Oginga Onyoni and Nyasimi Nyasimi (a minor) and Kenyatta Nyasimi (a minor) were registered owners on 23<sup>rd</sup> March 2005. There is no evidence that any succession proceedings were initiated for personal legal representatives to be appointed and/or that Joseph Oginga Onyoni had any authority. The 3<sup>rd</sup> respondent has contended the 1<sup>st</sup> petitioner got registered without going through succession. The abstract of title shows that title **South Mugirango/Boikanga/244** was closed on 29<sup>th</sup> March 2012 following subdivision and creation of new titles namely parcel numbers **2616, 2617 and 2618**. The 3<sup>rd</sup> respondent was registered as owner of land parcel **South Mugirango/Boikanga/2618** on 4<sup>th</sup> May 2012 in implementation of the award that was adopted by the Ogembo Magistrate’s Court.

18. The estate of a deceased person can only be dealt with by the personal legal representative of the deceased person and not otherwise in terms of Section 82 of the **Law of Succession Act**, Cap 160 Laws of Kenya. The court in the case of **Troustik Union International & Another –vs- Mbeyu & Another [1993] eKLR** held that the estate of a deceased person is vested in legal representative and it is only the legal representative who has capacity to represent the estate. In the case of **Omari Kaburi –vs- ICDC [2007] eKLR** Lady Justice Wanjiru Karanja (as she then was) held that:-

**“The law is that the grant is what clothes a person with locus standi to standi in and sue on behalf of the estate of the deceased...”.**

The property of a deceased person belongs to the estate and the only person who has a right over the same is the legal representative of such estate. Due process has to be followed in having a legal representative of a deceased person appointed and until that is done any actions carried on respecting the estate of a deceased person are without authority and amount to nothing as they are illegal and a nullity. The person carrying out the acts would be without any locus. Under Section 80 (2) **Law of Succession Act**, Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Section 82 (a) of the Law of Succession Act gives power to a personal representative to sue.

**82. Personal representative shall subject only to any limitation imposed by the grant have the following powers:-**

**(a) To enforce, by suit or otherwise all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representatives.**

**(b) .....**

**(c) .....**

19. The petitioners have not demonstrated that appropriate succession proceedings were taken out when the suit property was registered in the 1<sup>st</sup> petitioner's name and 2 others in 2005. I hold that there was no due process and their registration was a nullity for want of due process in regard to the succession of the registered owners through appropriate succession proceedings where personal legal representatives of the deceased were appointed to represent their respective estates. The 3<sup>rd</sup> respondent equally could not initiate the proceedings before the land disputes Tribunal in his name claiming an interest to his late father's estate without obtaining grant of letters of administration in regard to his late father's estate. He consequently lacked the locus standi to commence any proceedings in regard to any claims relating to his deceased father's estate without complying with the **Law of Succession Act**, Cap 160 Laws of Kenya as pertains to appointment of a personal legal representative.

20. My above analysis disposes of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> issues as identified earlier in this judgment and it must by now have become clear that the award by the Tribunal must be declared as null and void which of necessity means there was in effect no valid award that the Ogembo Senior Principal Magistrate's Court could purport to adopt and give effect to. It further follows the title obtained by the 3<sup>rd</sup> respondent pursuant to the impugned award cannot be held to be valid and that the same is for cancellation. The registration of the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> petitioner and Kenyatta Nyasimi (minor) as owners of the suit property was irregular to the extent that there was no compliance with the Law of Succession Act, Cap 160 Laws of Kenya and in my view cannot be allowed to stand and will consequently have to be cancelled.

21. In the result I find and hold that the petition for the reasons that I have discussed in this judgment has merit. I allow the same and make the following orders:-

**1. I declare the award dated 24<sup>th</sup> August 2011 made by the 2<sup>nd</sup> respondent null and void.**

**2. The adoption of the award as judgment by Ogembo PM Court vide Misc. App. No. 32 of 2011 and all consequential orders thereof be and is hereby declared null and void for all purposes.**

**3. The registration of Joseph Oginga Onyoni, N N (minor) and K N (minor) as owners of land parcel South Mugirango/ Boikanga/244 be and is hereby declared null and void.**

**4. The subdivision of land parcel South Mugirango/Boikanga/244 to create land parcels South Mugirango/Boikanga/2616, 2617 and 2618 and the further transfer of land parcel South Mugirango/Boikanga/2618 in the name of Reuben Onserio Oyondi are declared null and void and the land registrar is hereby directed to rectify the register and restore Onyoni Manyore**

**(deceased) and Nyasimi Manyore (deceased) as the registered owners of land parcel South Mugirango/Boikanga/244 pending appropriate succession proceedings and/or further orders of the court.**

**5. Each party to bear their own costs of the petition.**

**Judgment dated, signed and delivered at Kisii this 29<sup>th</sup> day of July, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Bigogo for Mokuu for the petitioner

N/A for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent/applicant

Mr. Moseti for the 3<sup>rd</sup> respondent

Mr. Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**