



**REPUBLIC OF KENYA**

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

**ELC JUDICIAL REVIEW CASE NO.128 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW BY WAY OF CERTIORARI PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990**

**AND**

**IN THE MATTER OF DECISION MADE ON 10<sup>TH</sup> FEBRUARY 2010 BY THE SIAYA  
DISTRICT LAND DISPUTES TRIBUNAL CASE NO.78 OF 2009**

**AND**

**IN THE MATTER OF A DECISION BY RESIDENT MAGISTRATE, SIAYA GIVEN  
ON 29<sup>TH</sup> APRIL 2010 IN LAND DISPUTES TRIBUNAL CASE NO.18 OF 2010**

**JOHN OKELO OKONYO.....EX PARTE APPLICANT**

**VERSUS**

**SIAYA DISTRICT LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

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

**THE DISTRICT LAND REGISTRAR –SIAYA.....3<sup>RD</sup> RESPONDENT**

**AND**

**ALEX OPIYO APOME.....INTERESTED PARTY**

**RULING**

**1. John Okelo Okoyo**, the exparte Applicant, filed the exparte chamber summons dated 10<sup>th</sup> June 2016 under order 53 Rule 1 (1, 2, 3) and article 23 of the Constitution against **Siaya District Land Disputes Tribunal, Siaya Resident Magistrate, Siaya, The District Land Registrar Siaya**, hereinafter referred to as **1<sup>st</sup> to 3<sup>rd</sup> Respondents** and **Alex Opiyo Apome**, the Interested party. The exparte Applicant

**seeks for the following orders:**

- a) Leave to apply for certiorari orders to call and quash the 1<sup>st</sup> Respondent's decision of 10<sup>th</sup> February 2010, and 2<sup>nd</sup> Respondent's adoption order of 29<sup>th</sup> April 2010.
- b) Leave to apply for Prohibition Order against 3<sup>rd</sup> Respondent prohibiting the transfer of land parcel **South Gem/Kaudha/1227** to the Interested Party.
- c) Leave to apply for an order of Mandamus to compel the 3<sup>rd</sup> Respondent to set aside and or cancel any transfer of the suit land to the Interested Party and reinstate the Exparte Applicant's name as proprietor.
- d) That the grant of leave do operate as stay of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's decisions dated 10<sup>th</sup> February 2010 and 29<sup>th</sup> April 2010 respectively.
- e) That costs of the application be in the cause.

2. The application is based on five grounds on the chamber summons and is supported by the statement of facts dated 10<sup>th</sup> June 2016 and affidavit, verifying statement of facts sworn by the exparte Applicant on 10<sup>th</sup> June 2016. The brief facts discerned from the documents filed by the Exparte Applicant including the copy of the Siaya Land Disputes Tribunal in Land case **No.78 of 2009** over land parcel **South Gem/Kaudha/1227** is that though the exparte Applicant got registered as proprietor of the said land on 17<sup>th</sup> November 1994. That the Interested Party has been in exclusive occupation of the land since 1979. That upon the Interested Party realizing that the land was registered in the names of the Exparte Applicant, he filed the Siaya Land disputes Tribunal case number 78 of 2009 seeking to have “ **John Okelo Okoyo .... explain how and why he got registered (with) the suit land**”. The tribunal heard the exparte Applicant, the Interested Party and witnesses and made the following observation and order;

*“ The claims of the claimant (Interested Party) and the objector (Exparte Applicant) over this land Kaudha./1227 were dimmed when it was revealed that James Nyabola had two sons namely; Otieno Nyabola and James Nyabola. This revelation was confirmed by the objector who expressed his willingness to hand over the said land to the Nyabolas. Despite all these statements made for and against the claimant's Alex opiyo Apome, it was unanimous that he has been living on this land for 31 years now. It was also unanimous that Alex Opiyo Apome has no other land apart from this one where he build his home in 1979. The objector John Okelo Opiyo who registered his name on this land parcel No .South Gem/Kaudha/1227 is discovered had never tilled this land since its registration and he secretly registered it to his names on 17/11/94. He does not even live on it. He had also been given three (3) months to produce the sons of Nyabola whom he claimed to be holding this land in trust (for). He has failed to do so. It is also noted that Alex Opiyo*

*Apome has lived in this land since 1979, the time he put up his home on it without anybody complaining for the last 30 years. Therefore because of the adverse occupation or limitation of action act, cap 22 rule which is a minimum of 12 years as per legal requirement, the District Land disputes Tribunal has allowed the application by Alex Opiyo Apome.*

**ORDER:** *Since the suit land was not originally in the objector father's names, and he transferred the whole of it to his names disregarding the claimant who has always been living there ..... The District Land Dispute Tribunal court has ordered (that), the District Land Registrar to cancel the names of John Okelo Okoyo and replace them (sic) with the names of Alex Opiyo Apome as the sole proprietor of the land parcel No. South Gem/Kaudha/1227.*

***R.O.A to the Provincial Land Appeal Committee within 30 days after adoption”.***

The tribunal award was adopted in accordance with Section 7 of the Land Disputes Act (repealed)

on 29<sup>th</sup> April 2010 in Siaya P.M. C Land Disputes Tribunal Case No.18 of 2010 as confirmed in the attached copy of the proceedings.

3. The following is the issues for determination;

a) Whether leave sought should be granted.

b) The order on costs to be made.

4. The court has carefully considered the grounds on the ex parte chamber summons, the statement of facts, the affidavit verifying the statement of facts, the annexures to the affidavit, the verbal submissions by Mrs Onyango, learned counsel for the Ex parte

Applicant and come to the following conclusions;

a) That the Siaya Land Disputes Tribunal decision made on 10<sup>th</sup> February 2010 was adopted on 29<sup>th</sup> April 2010 in Siaya P.M.C. Land Disputes Tribunal case No.18 of 2010 in the presence of both the Ex parte Applicant (objector) and the Interested Party (claimant) and the right of appeal to the Provincial Land Disputes Appeals Committee within 30 days was explained.

b) That there is no indication whether any of the parties filed an appeal in 30 days in accordance with **Section 8(1)** of the then Land Disputes Tribunal Act or challenged the Tribunal award and adoption proceedings/order in accordance with order 53 of the Civil Procedure Rules within six months as required.

c) That the ex parte chamber summons for leave herein was filed after a period of over 6 years had lapsed since the adoption proceedings of 29<sup>th</sup> April 2010. That the superior courts have time and again taken the position that the court should not entertain an application for leave to file for judicial review orders if it is not filed within 6 months from the date of the decision being impugned. The following decisions are among the many that have taken that position;

**i) Kimanzi Mboo –V- David Mulwa CACA no.233 of 1996**

**ii) Wilson Osolo –V- John Ojiambo & Another [1996] eKLR**

**iii) James Githinji Kiara –V- William Wachira Mwaniki [2005] eKLR.**

d) That even though the Siaya Land Disputes Tribunal may have exceeded their jurisdiction in their award, the Ex parte Applicant failed to challenge their decision within the period stipulated under the law and has not made any of effort to explain the over six years delay which is obviously inordinate and the ex parte chamber summons has no merit and fails.

5. That the Ex parte Applicant chamber summons dated 10<sup>th</sup> June 2010 has no merit as detailed above and is dismissed.

It is so ordered

**S.M. KIBUNJA**

**ENVELOPMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2016**

In presence of;

Ex parte Applicant Absent

Respondents Absent

Interested Party Absent

Counsel M/S Kyamazima for Mrs Onyango for Exparte Applicant.

**S.M. KIBUNJA**

**ENVELOPMENT & LAND – JUDGE**

**28/9/2016**

28/9/2016

S.M. Kibunja J.

Oyugi court assistant

M/S Kyamasima for Mrs Onyango for Exparte Applicant.

**S.M. KIBUNJA**

**ENVELOPMENT & LAND – JUDGE**

**28/9/2016**

Court: The Ruling delivered and dated in open court in presence of M/S Kyamazima for Mrs Onyango for Exparte Applicant.

**S.M. KIBUNJA**

**ENVELOPMENT & LAND – JUDGE**

**28/9/2016**