



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**E & L JUDICIAL REVIEW APPLICATION NO. 59 OF 2011**

**IN THE MATTER OF AN APPLICATION BY PETER OGATO ABOKI FOR JUDICIAL REVIEW  
IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990 (REPEALED)**

**AND**

**IN THE MATTER OF MOSOCHO LAND DISPUTES TRIBUNAL DISPUTE NO.1 OF 2011**

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

THE SENIOR RESIDENT MAGISTRATE,

NJERI THUKU.....1<sup>ST</sup> RESPONDENT

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

DISTRICT LAND REGISTRAR, KISII.....3<sup>RD</sup> RESPONDENT

**AND**

CHRISTOPHER ONGERI AMING'A.....1<sup>ST</sup> INTERESTED PARTY

MILKAH MAGOMA ONDIMU.....2<sup>ND</sup> INTERESTED  
PARTY

**EX PARTE**

PETER OGATO ABOKI

**JUDGMENT**

1. The ex parte applicant, **Peter Ogato Aboki** (hereinafter referred to only as “the applicant”)

obtained leave of this court on 20<sup>th</sup> June, 2011 to bring the application herein which was filed on 9<sup>th</sup> July, 2011. The application was brought on the grounds set out in the supporting affidavit and verifying affidavit of the applicant both sworn on 31<sup>st</sup> May, 2011 and the statutory Statement of the same date which were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. The applicant sought the following reliefs;

- i. **An order of certiorari to remove into this court and quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents;**
- ii. **An order of prohibition directed at the 3<sup>rd</sup> respondent prohibiting him from implementing the judgment/order of the 1<sup>st</sup> respondent that was delivered on 18<sup>th</sup> March, 2011 and issued on 25<sup>th</sup> March, 2011.**
- iii. **The costs of the application.**

2. The circumstances that gave rise to the application herein can be summarized from the said affidavits and the statement filed herein by the applicant as follows; the applicant was at all material times the proprietor of all that parcel of land known as LR. NO. West Kitutu/ Bogusero/ 3389 (hereinafter referred to as **“the suit property”**). The suit property was purchased by the applicant from the 2<sup>nd</sup> interested party. Sometimes in February, 2011, the 1<sup>st</sup> interested party lodged a claim against the applicant and the 2<sup>nd</sup> interested party with the 2<sup>nd</sup> respondent over the suit property. The 1<sup>st</sup> interested party claimed that the suit property belongs to him and that the same had been wrongfully transferred to the applicant by the 2<sup>nd</sup> interested party. The 2<sup>nd</sup> respondent entertained the claim and after hearing the applicant and his witness delivered its decision in the same month of February, 2011. The 2<sup>nd</sup> respondent held that the suit property belongs to the 1<sup>st</sup> interested party and ordered the 3<sup>rd</sup> respondent to transfer the same to him. The 2<sup>nd</sup> respondent’s said decision was lodged with the 1<sup>st</sup> respondent under the provisions of section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) for adoption as a judgment of the court. The 1<sup>st</sup> respondent adopted the said decision as a judgment of the court on 18<sup>th</sup> March, 2011 and a decree was issued accordingly on 25<sup>th</sup> March, 2011 for execution by the 3<sup>rd</sup> respondent. The applicant was aggrieved by the said decision of the 2<sup>nd</sup> respondent and its adoption by the 1<sup>st</sup> respondent.

**3. The grounds on which the application was brought;**

In summary, the applicants’ application was brought on the following main grounds;

- i. **that the 2<sup>nd</sup> respondent had no jurisdiction to entertain the dispute that existed between the 1<sup>st</sup> interested party on one hand and the applicant and the 2<sup>nd</sup> interested party on the other hand as it concerned title and/or ownership of the suit property;**
  - ii. **that the decision of the 2<sup>nd</sup> respondent was illegal, null and void ; and**
  - iii. **that the 1<sup>st</sup> respondent had no jurisdiction to adopt the said decision of the 2<sup>nd</sup> respondent as a judgment of the court.**
4. The application was not opposed by the respondents and the interested parties. The application was served upon them but none filed an affidavit in response to the same. When the application came up for hearing on 11<sup>th</sup> June, 2013, the advocate for the respondents indicated to the court that they were conceding to the application. The 2<sup>nd</sup> interested party who appeared in person also informed the court that she did not intend to oppose the application. The 1<sup>st</sup> interested party did not appear although he was duly served with a hearing notice. Since the application was not opposed, the advocate for the applicant relied on the applicant’s affidavit that was filed in support

of the application and the statutory statement and urged the court to allow the application as prayed. I have considered the applicants' application, the statutory statement and the affidavits filed in support thereof. The issues that present themselves for determination in this application are as follows;

- i. **Whether the 2<sup>nd</sup> respondent had jurisdiction to determine the dispute that was referred to it by the 1<sup>st</sup> interested party and to make the decision complained of;**
- ii. **Whether the 2<sup>nd</sup> respondent's decision aforesaid was valid;**
- iii. **Whether the 1<sup>st</sup> respondent had jurisdiction to adopt the 2<sup>nd</sup> respondent's decision aforesaid as a judgment of the court.**
- iv. **Whether the applicant is entitled to the reliefs sought against the respondents.**

I am in agreement with the applicant's contention that the 2<sup>nd</sup> respondent acted outside its jurisdiction when it entertained the 1<sup>st</sup> interested party's claim against the applicant and the 2<sup>nd</sup> interested party. The 2<sup>nd</sup> respondent was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to only as "the Act"). The powers of the 2<sup>nd</sup> respondent were spelt out in the said Act. The 2<sup>nd</sup> respondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the 2<sup>nd</sup> respondent had jurisdiction as follows; ".....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; or**
- c. **trespass to land."**

From the foregoing, it is clear that the 2<sup>nd</sup> respondent did not have jurisdiction to determine disputes over ownership and/or title to land. The 2<sup>nd</sup> respondent did not therefore have the power to declare the 1<sup>st</sup> interested party as the owner of the suit property and to order the 3<sup>rd</sup> respondent to transfer the suit property which is registered in the name of the applicant to the 1<sup>st</sup> interested party. It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was held that, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity. Having come to the conclusion that the 2<sup>nd</sup> respondent had no jurisdiction to entertain the claim that was brought before it by the 1<sup>st</sup> interested party, it is also my finding that the proceedings before the 2<sup>nd</sup> respondent and its decision made in February, 2011 were nullities. Now that the decision of the 2<sup>nd</sup> respondent was null and void, was it open to the 1<sup>st</sup> defendant to adopt it as a judgment of the court? In the case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 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 and 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 2<sup>nd</sup> respondent was a nullity, there was nothing in law that could be filed before the 1<sup>st</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 2<sup>nd</sup> respondent was lodged with the 1<sup>st</sup> respondent for adoption envisaged a lawful decision by the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent had no jurisdiction under section 7 of the

Land Disputes Tribunal Act aforesaid to adopt annul and void decision by the 2<sup>nd</sup> respondent. Since the decision of the 2<sup>nd</sup> respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 1st respondent could enter judgment and issue a decree. That leaves the issue as to whether this is an appropriate case to grant the orders of certiorari and prohibition sought by the applicant. This court has power under section 13(7) (b) of the Environment and Land court Act, 2011 to grant the prerogative orders sought. As I have already concluded herein above, the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted in excess of the jurisdiction conferred upon them by law. Their decisions were therefore a nullity. I am satisfied that this is an appropriate case to grant the orders sought by the applicant. The applicants' Notice of Motion application dated 8<sup>th</sup> July, 2011 is well merited. The same is allowed in terms of prayers 1 and 2 thereof. Since the application was not opposed, each party will bear its own costs.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of November, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

Mr. Nyamwange holding brief for Mose for the Applicant

No appearance for the Respondents

No appearance for the 1<sup>st</sup> Interested party

No appearance for the 2<sup>nd</sup> Interested party

Mobisa Court Clerk

**S. OKONG'O,**

**JUDGE.**

**E&L.JR.NO. 59 OF 2011**