



**REPUBLIC OF KENYA**

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

**H/MISC 59 OF 2012**

EPHRAIM MULIGA SIAHI.....APPLICANT

VERSUS

KISUMU EAST DISTRICT

LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

KISUMU CHIEF MAGISTRATE'S COURT.....2ND RESPONDENT

AND

MORNICA ODHIAMBO OBONG.....INTERESTED PARTY

**JUDGMENT**

1. On 21/5/2012 the exparte applicant herein – **EPHRAIM MULIGA SIAHI** – filed a Notice of Motion dated 30/4/2012 and brought under Order 53 rule 3 of civil Procedure Rules and Section 8 of law Reform Act.
2. The application is against **KISUMU EAST LAND DISPUTES TRIBUNAL** (1st Respondent) and **KISUMU CHIEF'S MAGISTRATE'S COURT** (2nd Respondent). It is also against **MONICAH ADHIAMBO OBONG** (interested party).

3. The following prayers are sought:

- That an order of **CERTIORARI** do issue to remove into this COURT and quash the **KISUMU EAST DISTRICT LAND TRIBUNAL'S CASE NO.27 of 2010**, decision dated 18/10/2011 concerning land Parcel No. **KISUMU/KANYAWEGI/593**, the reading and adoption/enforcement in Kisumu Chief Magistrate's Court.

- That the costs of this application and the earlier application for leave be borne by the interested party.

4. The application has on the face of it some grounds advanced in support but I hasten to add that I will not place any valiance on them as order 53 rule 2 requires that such grounds be filed together with the application for leave. Such grounds are usually filed together with a statement giving the name and description of the applicant, the relief sought and affidavits verifying the facts relied upon.

5. Fortunately, all such requirements, including the grounds, had been spelt out well in the earlier application for leave filed on 5/4/2012 and dated 2/4/2012.
6. in brief, the tribunal was said to lack jurisdiction to entertain and adjudicate the claim. It is said to have acted ultra -vires and the interested party was said to lack **LOCUS STANDI** to claim land allegedly belonging to her father in-law. The claim was said also to be statutorily time-barred, having been brought after 12 years and the tribunal is said to have breached the rule of natural justice. Also faulted was the legality of the membership of the tribunal.
7. The verifying affidavit accompanying the application gave some history. The Exparte applicant said he currently owns the land – **KISUMU/KANYAWEGI/593** (hereafter the suit land) – having bought it from one **JAMES ODEDE ATHUOK**. The interested party is said to be the widow of Andrew Ochuka Olik, who is now deceased and was son of the late Mzee Olik Olwanda. Mzee Malik Olwanda owned the suit land but sold it before his death to **SOLOMON WADOYI OHINGO** who is also now deceased. Solomon left a widow- **EDWINA MONICA OHINGO** – who inherited the suit land. Edwina then transferred the land to **JAMES ODEDE ATHUOK** and James then transferred the land to the **EXPARTE** Applicant herein.
8. The respondents conceded to the application herein on 22/1/2013. That left the interested party as the only one contesting it.
9. The interested party filed a replying affidavit on 15/1/2013. She alleged, inter alia, that the application is brought in bad faith, that the suit land belonged to the interested party's father-in-law and was never sold to anyone, that the tribunal awarded the land to her, and that the representative of the Exparte applicant attended the tribunal and never questioned its legality.
10. The matter never went for hearing. Submissions were filed instead. The applicant's submissions were filed on 9/7/2013. The submissions reiterated much that was stated in the grounds in support, the verifying affidavit and the statement of facts all filed together with the application for leave dated 2/4/2012.

In addition, and for purposes of guidance, the scope of judicial review was delineated as stated in the decided case of **R VS CHAIRMAN MAKUENI DISTRICT LAND DISPUTES TRIBUNAL: CIVIL MISC APPL. NO.112/2002** and **KENYA NATIONAL EXAMINATIONS COUNCIL VS R. CA. 266/1966**.

11. The interested parties submissions were filed on 10/7/2013. it was stated that the tribunal had jurisdiction to do what it did since the suit land was ancestral land. The interested party was also said to have been in uninterrupted occupation and the land was said to be held under customary law.

The interested party was said not to be statutorily barred in bringing her claim, having brought it within the required period, which counsel stated to be 10 years.

The sale and various transfers were said to have been done illegally and fraudulently. The Court was also told to hold that the interested party owns the land by virtue of the doctrine of adverse possession.

The following decided cases were availed:

- **KIPKETER TOGOM VS ISSAC CIPRIANO SHINGORE 2012 Eklr**. This one is meant to support adverse possession.

- **INLAND BEACH ENTERPRISES LIMITED VS SAMMY CHEGE & 15 OTHERS (2012) Eklr.** This one also is meant to advance the cause of adverse possession.

12. I have carefully considered all the material laid before me. This is a simple and straight forward matter especially when one considers the law that the tribunal was enjoined to follow.

Under the Land Disputes Tribunal's Act No.18 of 1990, the tribunal only had power to determine the division of land or determination of boundaries to land including where such land was held in common or claim to work or occupy land. Trespass also came within its domain. But the tribunal in this case clearly addressed itself to ownership. It had no power to do so and on that ground alone, the claim of exparte applicant succeeds.

13. The interested party has approached the matter as if this Court is considering the merits of the case. That is not the case. The court is considering the legality of what was done.

Arguments such as the suit land being held under customary law or the interested party being entitled to it under adverse possession do not really apply and are inappropriate. The major consideration is whether the tribunal could declare somebody an owner of a given piece of land. It clearly could not as it had no such mandate under the law. The only place where the arguments of the interested party would come in properly for consideration is in a court of law but the claim has to be appropriately brought to ventilate such issues. As things stand now, such issues are only belatedly raised in submissions. The other side has had no such to reply to the issues, but even if it had, this matter is clearly one dealing with legality, not merits.

14. The exparte applicant's side also raised other issues apart from the issue of jurisdiction. For instance, the claim was stated to be time-barred. This point was not articulated well. The court has not availed the various dates on which the transactions were done in order to assess time. The interested party's side tried to counter its point by saying that the interested party was within time, having brought her claim within 10 years. With respect, the period is not 10 years but 12. Section 7 of Limitation of Actions Act (Cap 22) is clear on that.

So, this argument by the Exparte applicant fails not because of any counter – argument by the other side but because of lack of supporting details to drive the point home. The other argument raised concerned the way the tribunal was constituted. This argument was also not put forward convincingly. It was not raised in submissions. And in the grounds where it appears, it is merely stated without being explained. Explanation is therefore lacking. It is only when one looks at the proceedings of the tribunal as availed that it becomes manifest that the tribunal is stated to consist of the chairman and 3 other members. This is contrary to the Chairman and 2 or 4 members as required by Section 4 of the Land Disputes Tribunal's Act.

15. But when one looks at the panel that duly signed the award, it is a perfectly legally constituted panel since it comprises of the chairman and 2 members. This argument of the applicant therefore also fails.

16. Overall however, the application of the Exparte applicant succeeds because of what has been stated elsewhere in this judgment: **LACK OF JURISDICTION** for the tribunal to make the decision that it did. The tribunal had no mandate in law to do that.

17. For this reason, the Exparte applicant is granted prayers 1 and 2 in his application filed here on 21/5/2012 and dated 30/4/2012. these are the same prayers stated in paragraph 3 of this

judgment.

**A.K. KANIARU – JUDGE**

**10/12/2013**

**10/12/2013**

A.K. Kaniaru – Judge

Dianga – C/C

No party present

interpretation – English/Kiswahili

Odeny for Exparte Applicant

Mwamu (absent) for interested party.

**COURT:** Judgment read and delivered in open COURT.

Right of Appeal – 30 days

**A.K. KANIARU – JUDGE**

**10/12/2013**



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