REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

JUDICIAL REVIEW NO.10 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF LAW REFORM ACT (AND ORDER 53 RULE 3 OF CIVIL PROCEDURE RULES)

AND

IN THE MATTER OF AN APPLICATION BY CHRISTOPHER JAKOYA ASIKA

BETWEEN

REPUBLIC ……..……..APPLICANT

VERSUS

1. CHIEF MAGISTRATE'S COURT AT BUSIA

2. CHARLES OPONDO OYENGA

3. HON. THE ATTORNEY GENERAL ……...RESPONDENTS

JUDGMENT

1. The exparte Applicant herein – **CHRISTOPHER JAKOYA ASIKA** – took over these proceedings from his late father – **CHARLES OMOLO ASIKA** who passed on sometimes after commencing the matter. His father then wanted an order of **PROHIBITION** to run against the three (3) Respondents – (1) **THE PRINCIPAL MAGISTRATE'S COURT, BUSIA**, (2) **CHARLES OPNDO OYENDA** and (3) **HON. THE ATTORNEY GENERAL**.

2. The order of prohibition was being sought to stop adoption of the decision of the now defunt Butula Land Disputes Tribunal as judgment of a Court of law. Without an order of prohibition the decision was set to be adopted as judgment in BUSIA PMCC (LD) No.9/2009.

3. Some background is necessary. The exparte applicant's late father had sued the second Respondent at Butula Land Disputes Tribunal in a dispute that related to land parcel No.**MARACHI/ESIKOMA/1309**. That was way back in year 2008. The exparte applicants late father claimed, *inter alia*, that he had given

the 2nd Respondent a temporary right of stay on a portion of the land after the 2nd Respondent came back to Kenya after being sent away from Uganda. The story given is that the stay was meant to be purely temporary and the 2nd Respondent was meant to look for his own piece of land and settle there. But the 2nd Respondent is said to have overstayed his welcome and when asked to leave he refused to do so. That is what gave rise to the dispute before the tribunal.

4. But the 2nd Respondent has a different story. The land, he said, belonged to his late father. He came from Uganda and found it registered in the name of exparte applicant's late father. He asked to be allowed to settle on his father's land and a clan meeting was called to deliberate on the issue. The clan allowed him to settle. The exparte applicant's late father was opposed to it but the clan was for him. The 2nd Respondent eventually settled on the land and put up his home there. He wanted to be registered as owner but the exparte applicant's late father couldn't allow it.

5. When the exparte applicant's late father went to the tribunal it is clear he wanted the 2nd Respondent ordered to vacate the land. The tribunal however disagreed with him and awarded the 2nd Respondent a portion measuring 165 x 106 strides (stated to be "walk with long steps"). This is the decision that the exparte applicant did not want the Court to adopt. It is the decision that led to commencement of these proceedings.

6. It is clear that before the issue of the order of prohibition could be considered, the Court here at Busia adopted the tribunal's decision as its own judgment on 8/4/2009. That threw a spin into the proceedings because the order of prohibition could no longer be pursued. It had already been overtaken by events. This necessitated a different approach. A prayer for CERTIORARI was then deemed necessary to quash the decision. Amendment also became necessary to make the new prayer and to substitute the exparte applicants late father. The amendment was sought and granted.

7. The grounds on which the application is brought stipulate, *inter alia*, that the tribunal erred in over-exercising its powers; that there was no quorum at the time of proceedings and decision-making, and that the decision of the elders was biased and amounted to miscarriage of justice.

8. The 2nd Respondent responded vide a replying affidavit filed here on 14/6/2016. He deponed, inter alia, that it is the exparte applicant's late father who had taken him to the tribunal. That the matter was heard and the father lost; that the tribunal ended up awarding the 2nd Respondent a portion of the land; and that the exparte Applicant's late father never appealed.

9. The 2nd Respondent further Respondent further said that the exparte applicant his brother sued him in BUSIA ELC No.76 of 2014, a suit he had defended and also lodged a counter-claim. This suit itself came later from the exparte applicant with the aim of defeating the 2nd Respondents counter-claim. This suit itself is said to be misplaced because it focuses on the merits of the award made by the tribunal, which is something this Court has no power to entertain.

10. The grounds advanced by the exparte applicant to support his application were also faulted. According to the 2nd Respondent, the tribunal was properly constituted if its membership had at least 3 elders. The tribunal had 9 members. The quorum was therefore said not to arise. The exparte applicant was also said to have failed to disclose the identity of the member who is said to have signed the proceedings without having participated in its deliberations. The exparte applicants late father was said to be the one who had taken the matter to the tribunal as the land owner and the exparte applicant can not therefore turn around to fault the tribunal for making a decision without ascertaining ownership.

11. The amendment done by the exparte applicant was also faulted. According to the 2nd Respondent, here is no law allowing amendment of judicial review application.

12. No hearing took place; submissions were filed instead. The exparte applicant's submissions were filed on 8/11/2016. It was urged that the application be allowed for various reasons. One of the reasons

was that leave to file the application was properly granted and the amendments done to the proceedings later were also properly granted. It was argued that if the 2nd Respondent was opposed to the granting of leave or amendments, he should have filed an application to oppose. In the exparte applicant's view, it is wrong for the 2nd Respondent to raise issues to do with leave or amendment in the manner that he has. The decided cases of **PHILIP WANGALWA VS INDUSTRIAL DEVELOPMENT BANK LTD, HCCC No.4 of 2006, BUSIA,** and **AGA KHAN EDUCATION SERVICE KENYA VS REPUBLIC** through **ALI SELF & 3 OTHERS, CA No.257 of 2003, NAIROBI**, were availed to drive the points home.

13. In Philip Wangalwa's case (supra) the Court held, inter alias, that amendment should be allowed if no injustice is likely to be occasioned to the other side and where costs are enough to compensate the other side. In Aga Khan's case(supra) the Court observed that to grant leave only demonstration of an arguable case is required. There is no need to delve deep into the matter. It was further held that challenging the leave granted required a formal application to be filed.

14. The exparte applicant severed also that the award of the tribunal to the 2nd Respondent was a nullity and the Court is obliged not to turn the other way if that is the position. The Court by adopting a procedure that saves them litigating again over the issues. It was observed too that the decision or award given was against a party who did not own the land at the time. It was said to be another indication that the decision was a nullity.

15. The tribunal was also said to lack jurisdiction to decide on a matter touching on beneficial ownership. The dispute was said to revolve around beneficial ownership of land parcel No.**MARACHI/ESIKOMA/1309**. The tribunal was said to have lacked jurisdiction to decide on this. It is said to have exceeded its powers as its award would affect the title to the land.

16. The decided cases of **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL AND ANOTHER: CA No.256/02, Kisumu** and **CHRISTINE SCHNEIDER & ANOTHER VS DISTRICT LAND TRIBUNAL & ANOTHER: HC MISC. APPLICATION No.1058 of 2006, MOMBASA,** were availed to make the point. In Jotham Amunavi's case (supra), the Court observed, inter alia, that the issue of beneficial interest was outside the jurisdiction of the tribunal and in Christine Schneider's case (supra) the tribunal was said to lack mandate to entertain matters dealing with title.

17. It was also pointed out that the tribunal, being not a Succession Court, lacked jurisdiction to award land to the 2nd Respondent who was without any Letters of Administration. The tribunal was faulted because the land was said to have belonged to the 2nd Respondent's deceased's father. It was part of his estate. For the 2nd Respondent to get the land, he required the requisite grant from Court. He had no such grant yet the tribunal proceeded to award him the land.

18. The exparte applicant also took issue with the composition of the tribunal. It had 9 members, he said, instead of 3 or 5. Its decision was said to be unanimous yet only 3 out of the 9 members signed. Failure of the others to sign was said to make the decision improper. The case of **JOSEPH OKWOMI OKWENDO VS CHAIRMAN SOUTH WANGA LAND DISPUTES TRIBUNAL & OTHERS: CIVIL APPEAL No.92 of 2006, KAKAMEGA**, was said to illustrate the point. In the case the tribunal had 9 elders. Only 6 signed the award. The tribunal was said to be improperly constituted and was also faulted because only some of its members signed the award.

19. The final point made by the exparte applicant is that the law awarded to the 2nd Respondent belonged to him and his brother. They were never heard before the tribunal though the decision affected them. The rules of natural justice were not adhered to as they were condemned unheard.

20. The 2nd Respondent's submissions were filed on 6/12/2016. It was submitted first that no leave to file the application was ever granted as proceedings for such leave were not availed. But should it turn out that leave was granted, there are still other good reasons for disallowing the application.

21. According to the 2nd Respondent, the original application for leave sought for an order of PHROHIBITION. But the original exparte applicant, who was the father to the current exparte applicant, died before prosecution of the application for leave. The current exparte applicant then came on board after getting Letters of Administration. He amended the application and changed the prayer to one of CERTIORARI.

22. It was pointed out also that the deceased father of the exparte applicant owned the land when he initiated tribunal proceedings. During the pendency of the proceedings however he transferred the land to his two sons, one of whom is the exparte applicant. He therefore ceased being the registered owner of the land. This, according to 2nd Respondent, was meant to defeat the 2nd Respondents claim. And that claim was contained in a counter-claim in BUSIA HCCC No.l60 of 2010 (ELC No.76 of 2014), which is a suit instituted by the exparte applicant. In the suit, the 2nd Respondent is seeking to enforce the tribunal's award while the exparte applicant wants the 2nd Respondent and his mother evicted from the land.

23. Given the above scenario, the exparte applicant submits, inter alia, that the applicable law does not allow survival of suit upon the death of an applicant. The 2nd Respondent stated that when the initial exparte applicant died, the application for leave did not survive him.

24. It was submitted too that the initial application for leave sought for an order of PROHIBITION. It was amended later and the prayer for an order of CERTIORAI replaced the prayer for an order of PROHIBITION. The 2nd Respondent submitted that there is no law allowing amendment. The decided case of **STEPHEN MWANGI MAINA VS THE REGISTRAR OF SOCIETIES and 6 OTHERS**: **HCC Misc. APPL No.260 of 2007, NAIROBI**, was availed to buttress this point. In the case, the Court (R.U.P Wendoh J) observed that amendment was not provided for and the applicant who had filed a defective application was said to have the option of withdrawing it and file a proper one.

25. The order of CERTIORARI sought was also said to require a period of 6 months within which it must be filed after the decision being challenged is made. This one was said to be made years after the decision was made. The case of **DICKSON MIRICHO MURIUKI VS CENTRAL PROVINCIAL LAND DISPUTES COMMITTE & others: HCC MISC. APPL. No.112 of 2008, NYERI**, was said to make this point.

26. The exparte applicant was said to be wrong to suggest that leave should be challenged by way of a substantive application. The 2nd Respondent said he did know of and/or when leave was obtained. He urged the Court to declare the proceedings incompetent.

27. The tribunal was also said to have the requisite jurisdiction to entertain the dispute. The 2nd Respondent was sought to be declared a trespasser. The claim therefore fell within the jurisdiction of the tribunal. The award made was said to fall under the jurisdiction of the tribunal to handle claims to work or occupy land. The case of **PIUS OUMA WANGA VS SYLVESTER ODHIAMBO WANGA. HCC No.54/2011, BUSIA** was cited with approval in this regard.

28. The second Respondent felt dissatisfied with the exparte applicants allegation that the award was against a party who didn't own the land or that the award made to him cannot stand because he didn't have Letters of Administration for the estate of his late father. He argued that the deceased father of the exparte applicant represented to the tribunal that he owned the land. The exparte applicant can not therefore turn around to fault the tribunal. He argued further that he didn't take ambiguity to the tribunal; he was taken there instead. He couldn't therefore be faulted for tot having Letters of Administration. The matter before the tribunal, he argued, was against him in person, not as a representative of his father's estate.

29. As to the membership of the tribunal, doubts were expressed as to whether a member actually participated in the tribunal. According to the 2nd Respondent, the 9 members listed represented gazette members, not the members participating. In any case, he further argued, 3 of them, who are the participating members, signed the award. His other position is that membership is a question of fact and

no prejudice is shown to have been occasioned to the exparte applicant.

30. The 2nd Respondent also felt that he tribunal should have been joined as a party to these proceedings. Proceeding without it would be in violation of rules of natural justice as it is entitled to be heard.

31. I have considered the proceedings, the authorities availed and the submissions made. The approach taken by both sides is decidedly technical. Using that approach the exparte applicant has pushed for interpretation that ensures that the decision made by the tribunal forms the basis of the Court's decision. In simple terms he wants the Court to hand out substantive justice. The 2nd Respondent on the other hand would rather that the procedural shortcomings he pointed out be the basis of the Court's decision. In its sense he favours an interpretation that will attain technical justice for him.

32. In my approach to the issues raised, I will generally be guided by Article 159 (d) of the Constitution of Kenya which enjoins "that justice shall be administered without undue regard to procedural technicalities". In a more specific sense, Section 19(1) of Environment and Land Court Act (Cap 12A), which urges the need to expedite and act without undue regard to technicalities of procedure, will also guide me. It is important to add that the Environment and Land Court Act (Cap 12A) envisages under Section 12 (76) (b) that this Court will handle proceedings leading to issuance of prerogative orders (Mandamus, certiorari and/or prohibition) either these are therefore proceedings to which Section 19 (1) of the same Act as cited above also apply.

33. The Constitutional and Statutory provisions cited, which underpin my approach herein, were enacted to ensure break with an unsatisfactory past; a past where technicalities of procedure had been invoked and supplied by the Courts in a manner that ran athwart to the interests of substantive justice.

34. Judicial review proceedings suffer the disadvantage of being conducted in an environment where the applicable statutory law is inadequate. The substantive and procedural law applicable is thin on details and a lot is left to the Court to come up with jurisprudence that fills in the gaps. The Courts themselves have not helped matter. The jurisprudence that has emerged is not uniform and is attended by rigidity that has elevated procedure to the same level as substantive law. In this sense, technical justice, as opposed to substantive justice, has held sway.

35. I now need to turn to the issues raised in this matter. The first one is leave. Leave was said not to have been granted. The fact of the matter is that leave was granted. A look at Court records shows this clearly and due diligence on the part of the second Respondent would have revealed it.

36. The other issue concerns the amendment of the application for leave. According to the second Respondent, the applicable law does not provide for amendment. He even provided a decided authority – Stephen Mwangi's case (supra) which advances that view. I have read the case. True, an application for leave was rejected because the law did not provide for amendment. In the same case however, the Court took the position that the applicant should have withdrawn the application and filed another one.

37. The scenario that arises raises more questions than answers. For instance, if the application had to be rejected because amendment was not provided for, which law provided for withdrawal and fresh filing of another application? The obvious answer is that there is no law providing for that. The Court was merely being innovative in suggesting that alternative. In my view, it is this same innovativeness that should have led the Court to allow amendment by virtue of its inherent jurisdiction. The exparte applicant has pointed out that it could be done under the inherent powers of the Court. The decided case availed to support this position is a civil one and the 2nd Respondent's die has faulted it for this reason. The fact of the matter is that the inherent power of the Court to do justice cuts across all proceedings including judicial review proceedings. I am with the exparte applicant on this issue.

38.The 2nd Respondent also took issue with the fact that when amendment was done, the prayer for prohibition was abandoned and a prayer for CERTIORARI replaced it instead. An argument was raised that a prayer of CERTIORARI needed to be made within 6 months from the time of making the decision. Well, this is the law except that the 2nd Respondent did not reckon with the fact that Courts have held

that in some situations an order of certiorari can issue even where brought outside the 6 month period

39. In the case of R.V MASENO UNIVERSITY STAFF DISPINARY COMMITTEE & Another: HCC Misc. Appl. No.963 of 2000, NAIROBI, the Court took the position where the issue is jurisdiction and the decision made is alleged to be null and void, the 6 month limitation period does not apply. The 6 month period was said to apply to decisions, judgments and orders which are final orders of the Court. I think the reasoning behind this is that the decision issued is no time that nothing will become something even if you leave cit unchallenged. The same position in Maseno's case (supra) had also emerged earlier in **R.V. JUDICIAL COMMISSION INTO THE GOLDENBER AFFAIR exparte MWQALULU: Mis. Appl No.1`279/04 and in KENYATTA NATIONAL HOSPITAL VS THE MINISTER FOR LABOUR: misc. Appl 880/04**.

40. In the matter itself, jurisdiction is a core issue. The tribunal is said to have made a decision it had no mandate to make. That being the case, the 6 month rule must be relaxed because a nullity cannot be subject to the 6 months period as it does not exist. I therefore don't agree with the 2nd Respondent on the issue.

41. An argument was raised also by the 2nd Respondent that the Judicial Review proceedings do not survive their initiator. The reason for this is that the law available does not provide for it. True, the law does not provide for it. But a more pertinent question is: Does the law disallow it? And the answer to this is No. I think the argument raised fails to appreciate the nature of the proceedings that lead to these proceedings themselves. Whether one is talking of those or these proceedings,property law is at play. Infact the proceedings relate to land. I think there would be an element of legal naivety one if one were to argue that proceedings relating or touching on property cannot survive their originator.

42. In land law, we talk of corporal and incorporal hereditaments. Hereditaments are about inheritance of both tangible and intangible interests. At the core of this suit itself are competing claims of ownership of land whose alleged original owners on both sides are said to be dead. To allege that that judicial review proceedings can not apply to a situation like that is to leave aggrieved parties without recourse to the law. It is also to adopt a legalistic approach that ignores the facts and realities that should inform the Court processes. The Court takes a contrary view. And the view is that the nature of prior proceedings giving rise to judicial review proceedings should determine whether survival of action should lie. In this particular case, the survival of cause of action is applicable.

43. There is fear on the part of the 2nd Respondent that these proceedings are aimed at quashing the decision of the tribunal and that decision is the basis of the 2nd Respondents counter-claim in BUSIA HCC No.60/2010. The Exparte Applicant could well have such designs but in my view, the 2nd Respondent need not worry. Even if the decision is quashed, Court have been known to allow parties to file their claims in forums that have jurisdiction. The 2nd Respondent seems to me to be laboring under the mistaken or wrong belief that the tribunal award was well founded. It is necessary to revisit that decision.

44. In simple terms, the exparte applicant's father went to the tribunal to seek removal of the 2nd Respondent from the land. His argument was that the land was his as he was the registered owner. The 2nd Respondent would have none of this. He argued that the land was his as his late father was its original owner. The tribunal found for the 2nd Respondent. The 2nd Respondents Counsel tried to argue through ingenuity and craft of interpretation that the tribunal awarded the 2nd Respondent the land to work and/or occupy. That is not true. The proceedings show well that the land was awarded to the 2nd Respondent to own. The tribunal even directed that the surveyor goes to the land. Surveyors do not

go to survey for incumbent or prospective registered owner. The 2nd Respondent himself did not argue himself did not argue his case on the basis that he was entitled to work or occupy it. K it is clear that he claimed the land as his own because his late father owned it. This is the position: The tribunal had no power or jurisdiction to declare or find that the 2nd Respondent owned the land. The 2nd Respondent may harbour a false belief that the tribunal did justice for him. Well, it didn't because it had no power to do so.

45. And I say this because the tribunals jurisdiction as contained in the now repeated Land Disputes Tribunals Act (No.18 of 1990) and the said jurisdiction did not include issues of ownership or title. The jurisdiction was contained in Section 3(1) of the Act and was as follows:-

a) The division of, or the determination of boundaries to land, including land held in common.

b) A claim to work or occupy land.

c) Trespass to land.

It is clear from this that ownership is not one of the issues that the tribunal could handle yet when it decided to award a portion of the suit land it was trying to vest ownership in him.

46. What the tribunal did was therefore a nullity. It amounted to nothing. The 2nd Respondent rests in the false belief that he was awarded something. The truth is that the said award meant nothing.

47. But even if we were to assume that the award meant something, the Expart applicant's late father had a trick or two up his sleeve. He seems to have sensed that things were not going his way at the tribunal. He stealthily transferred the land to his two sons who included the exparte applicant. He failed to disclose this to the tribunal and the proceedings went on as if there was no change of ownership.

48. I have seen arguments from the exparte applicant that seem to blame the tribunal and the 2nd Respondent for this. The truth is that neither the tribunal nor the 2nd Respondent is to blame. The blame lies squarely on the exparte applicant's side. That is why it would be unfair to the 2nd Respondent not to allow him to ventilate his claim at another appropriate forum so that its merits can be considered. There was blameworthy conduct on the part of the exparte applicant's father and aim seems to have been to place legal hurdles in the 2nd Respondent's way if he ever succeeded.

49. From all the foregoing, it is clear that I have Constitutional and Statutory basis for not allowing myself to be shackled by shortcomings or technicalities of procedure. I therefore refuse to be impeded by arguments raised herein by both sides concerning procedure. I have looked at the ultimate decision made by the tribunal and its clear that the tribunal had no jurisdiction to do what it did. An order of certiorari should therefore issue. The decision of the tribunal is hereby quashed. The order of certiorari is hereby granted but with a rider.

50. But let me mention something before I state the rider. In R. VS **PROVINCIAL LAND DISTPUTES TRIBUNAL & others EXPARTE JAMES OGINGA OCHIEL: HCC Misc. Appl No.22/09, KISUMU**, Lady Justice Abida Ali Aroni quashed a decision made without jurisdiction but observed that parties were at liberty to move to the High Court to ventilate their dispute there. In **ASMAN MALOBA WEPUKHULU & Another Vs FRANCIS WAKWA BUBI BIKETI: CA No.157/2001, KISUMU**, a decision made without jurisdiction was quashed and parties were directed to go back to a competent Court for proper hearing of their land dispute.

51. The rider then is this: Parties in this matter are at liberty to go to any forum with jurisdiction to argue their claim. This is allowed because what happened at the tribunal was an exercise in futility. Parties can also consider, if possible, the idea of incorporating their claim in the pending case between them.

A.K KANIARU

J U D G E

DATED AND DELIVERED ON THIS 31st DAY OF JANUARY, 2017

IN THE PRESENCE OF:

PLAINTIFF……

1ST DEFENDANT…….

2ND DEFENDANT…PRESENT……

3RDDEFENDANT…OTHER PARTIES ABSENT.

4TH DEFENDANT……

NO COUNSEL.