



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**MISC. CIVIL APPLICATION NO. 57 OF 2004.**

**REPUBLIC ..... APPLICANT.**

**VERSUS**

- 1. THE SENIOR RESIDENT MAGISTRATE, BUSIA**
- 2. THE DISTRICT LAND REGISTRAR, BUSIA**
- 3. THE DISTRICT SURVEYOR, BUSIA.....RESPONDENTS.**

**AND**

- 1. GRACE ANYANGO OLANDO**
- 2. JONATHAN WABALA**
- 3. HOLY REDEMED APOSTOLIC MINSTRIES .....INTERESTED PARTIES.**

**EX-PARTE .....BARASA EKAPOLONI AUKU.**

**J U D G M E N T**

**BARASA KAPOLONI AUKU**, hereinafter referred to as the Applicant, filed the notice of motion dated 24<sup>th</sup> May, 2004 through M/S. Wycliffe Obwoye Onsongo Advocate for the following orders;

1. An order of certiorari to call into this court and quash the order made on 4<sup>th</sup> December, 2002 in Busia SRM.CC. No.288 of 2000 and the District Surveyor's Report marked exhibit 'D 4'.
2. An order of certiorari to call into this court and quash the decision of the District (County) Land Registrar and Surveyor , Busia creating an illegal road of access on the Applicant's parcel No. South Teso/Angoromo/1094.
3. An order of Mandamus to compel the District (County) Land Registrar and Surveyor , Busia, to reinstate the original actual size 0.08 hectares and position of the Applicant's land parcel South Teso/Angoromo/1094, remove the illegal boundary features and structures erected thereon since the orders of 4<sup>th</sup> December, 2002 and put the Applicant to actual possession.

4. That Applicant be paid costs.

The application is based on the two grounds set out on the notice of motion, the statutory statement dated 3<sup>rd</sup> June, 2003 and filed in Busia H.C. Misc. Application No. 116 of 2003. It is also based on the Applicant's affidavit sworn on 4<sup>th</sup> June, 2003 and filed also in Busia HC. Misc. App. No. 116 of 2003.

The application names Grace Anyango Olando, Jonathan Wambala and Holy Redeemed Apostolic Ministries as the 1<sup>st</sup> to 3<sup>rd</sup> Interested parties respectively. It also named the Senior Resident Magistrate, District Land Registrar and Surveyor, Busia, as the 1<sup>st</sup> to 3<sup>rd</sup> Respondents respectively.

The learned litigation Counsel, Kisumu, filed two ground of oppositions documents dated 4<sup>th</sup> September, 2004 and 3<sup>rd</sup> March, 2005 on behalf of the Respondents raising the following issues;

1. That the application is mischievous and bad in law.
2. The application herein fails to demonstrate that the decision making process was in any way flawed.
3. The application is premature.
4. The application is misconceived and an abuse of the court's process.
5. The application is time-barred.

The first Interested Party (Grace Anyango Olando), filed replying affidavit through M/S. Ashioya & co. advocates, sworn on 31<sup>st</sup> March, 2014 opposing the application as made in bad faith, defective, waste of court's time, an afterthought and without merit. She prays that the application be dismissed with costs.

The 2<sup>nd</sup> Interested Party also filed replying affidavit sworn on 27<sup>th</sup> August, 2013 through M/S. Omondi & company advocates. He inter alia depones that the application is subjudice as there was pending an appeal on the same matter being Busia H.C.C. A No. 1 of 2003.[The Appeal was later decided on 19<sup>th</sup> February, 2014]. That no application to review and or set aside the lower court decision has been preferred. That the Applicant had also filed Busia SRM.CC. No 360 of 2000 against the Interested parties. That the application was filed out of time and therefore incompetent and should be dismissed.

The Applicant filed a further verifying affidavit sworn on 13<sup>th</sup> May, 2014 stating that the prayers sought herein will not be affected by the filing of, and decision in Busia H.C.C.A. No. 1 of 2003. That the application is not subjudice as he was not a party to the lower court proceedings. That the application was not affected by the dismissal of the suit in Busia SRM.CC. No.360 of 2000 as it related to a claim for 95,000/=, general damages, eviction and order to produce documents.

When the matter came up for hearing on 8<sup>th</sup> October, 2014, the court directed that counsel to the parties do file their written submissions. The Exparte Applicant's counsel filed their written submissions dated 24<sup>th</sup> October, 2014 on the same date. The counsel for 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties filed their written submissions dated 10<sup>th</sup> November, 2014 on the 12<sup>th</sup> November, 2014. Finally the counsel for the 1<sup>st</sup> Interested Party filed their written submissions dated 25<sup>th</sup> November, 2014 on the same date.

#### **EXPARTE APPLICANT'S SUBMISSIONS.**

1. That he is the registered proprietor of South Teso/Angoromo/1094 measuring 0.08 hectares which he acquired on 25<sup>th</sup> November, 1986 and the 1<sup>st</sup> Interested Party owns South Teso/Angoromo/2292. That

the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties owns South Teso/Angoromo/912.

2. That the Respondents and Interested Parties, on realizing there was no access road to serve the 1<sup>st</sup> Interested Party's parcel, purported to redraw the registry map converting the Applicant's entire parcel of land into an access road without according him a hearing contrary to the rules of natural justice. That orders to quash that decision should issue and referred to the case of **Adolf Gitonga Wakahihia –vs- Mwangi Thiongo/KAR1028**.

3. That 1<sup>st</sup> Interested Party filed Busia SRM.CC. No.288 of 2000, seeking for injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties who stated to the court that the road of access was over the Applicant's land relying on the report produced as exhibit BK (3) (b). That the Applicant was not notified of the creation of the access road over his land and was not made a party in Busia SRM.CC. No 288 of 2000.

4. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not produce the real original map and relied on a distorted draft.

5. That the lower court delivered its judgment on 4<sup>th</sup> December, 2002 and ordered the demolition of the Applicant's semi-permanent houses to pave way for the access road to the Interested Parties parcels of land.

6. That the Respondents acted ultra vires their powers by relying and issuing a report that was contrary to the registry map. The Applicant referred to the two following decided cases;

a) **Emma Magurusha Mahindra –vs- Dick Albert Osele Gari & Anor** Kisumu HCCC. NO. 124 of 2007.

b) **Onyango Oloo –vs- Attorney General** (1986 – 1989)E.A. 456.

Where the court held that “***the rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and appellant's legitimate expectation to benefit from the remission by a release.***”

7. That the 1<sup>st</sup> Interested Party's contention that the application is defective and lacks merit is a technicality which should not be upheld in view of Article 22(3) (d) of the Constitution which states that;

“ ***the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.***”

The counsel further submitted that there is no application filed to challenge the notice of motion and referred to Busia H.C. Misc. Application No. 23 of 2011 ***In the matter an Application by Samuel Evoni Stephen.***

8. That section 22 of the Registered Land Act (repealed) was not obeyed as he was not involved in the exercise resulting to the creation of the road of access over his land.

9. That the application is not time barred in view of the decisions in ***Wilson Osolo –vs- John Ojiambo Ochola & Another*** [1995] LLR 6084 and ***The Commissioner of Lands –vs- Hotel Kunste*** [1995] LLR 6057.

10. That the application is not res judicata as section 7 of the Civil Procedure Act envisages a suit between the same parties over the same subject matter and that the Applicant was not a party in Busia SRM.CC. No.288 of 2000 and Busia H.C.C .A. No. 1 of 2003.

11. That the Applicant was within his rights to file this application in view of section 9 (3) of the Law

Reform Act which empowers this court to quash judgments , orders , and decrees of Lower courts, even where the option of appeal exists. The counsel referred to the following decided cases;

a) *Bahaji Holding ltd –vs- Abdo Mohammed Bahaji & Co. ltd & Anor [1998] LLR 6537.*

b) *David Mugot t/a Manyatta Auctioneers –vs- R [1997] LLR 6204.*

c) *Commissioner of Lands & Anor –vs- Coastal Aquaculture ltd.*

[1996] LLR 6202.

12. That though Applicant was awarded general damages for wrongful demolition of his premises in his lower court case, the case did not deal with the issues he seeks to be addressed in this application. The counsel further submitted that the decision in Busia HCCA. No. 1 of 2003 only determined the rights of the Interested Parties and their respective parcels of land and has no bearing to this application

13. That sections 27 and 28 of the Registered Land Act (Repealed) were breached by the Respondents and Interested parties by their failure to honour the Applicant's title to his parcel of land. Their action was also contrary to Article 40 of the Constitution which protects the Applicant's right to his property.

14. That the Applicant moved to court within the six months of the making of the decision by filing the application for leave on 4<sup>th</sup> June, 2003 . That the leave was granted and the Applicant filed this substantive application within time in accordance with section 9 (3) of the Law Reform Act and Order 53 of the Civil Procedure Rules. That the application should be granted as prayed.

### **1<sup>ST</sup> INTERSTED PARTY'S SUBMISSION.**

1. That the Applicant has not proved that leave to file the substantive application was obtained before the application was filed. Further that even if the leave was obtained, the Applicant has not proved that the substantive application was filed within the time prescribed. The counsel therefore submits that in absence of proof on the two issues, the application is incompetent.

2. That the report by the Land Registrar and Surveyor followed a court order to settle an issue of boundary dispute. That after the report was presented in court, it indicated that the exparte Applicants structures had extended to the public road. The court consequently ordered the structures on the public road to be demolished and the Applicant's application is devoid of merit so long as he has not successfully challenged the decision in Busia PMCC. NO. 288 of 2000.

3. That the 1<sup>st</sup> Interested Party's structures were also demolished and she could not be blamed for the report and the court's decision as she was only a party in the proceedings.

### **2<sup>ND</sup> AND 3<sup>RD</sup> INTERESTED PARTIES SUBMISSIONS.**

1. That in view of annexure BKA 2 attached to the Applicant's further verifying affidavit, the Lower court's decision of 4<sup>th</sup> December, 2002 was reversed by the High court in Busia HCCA. No. 1 of 2003 and therefore does not exist to be called to this court and quashed as prayed in prayer 1.

2. That judicial review is concerned with the process and legality of the decision or otherwise and not the merits of the decision. That the Applicant has failed to show how the 1<sup>st</sup> respondent exceed its powers in issuing the orders complained of that resulted to the Applicant's structures being demolished to create the road of access. The counsel submitted that what Applicant is questioning is the merit of the judgment of the trial court which cannot be challenged in a judicial review application. The counsel

referred to the decided case of **Republic -vs- Chief Magistrate court, Nairobi Milimani Commercial Courts; Exparte Safaricom ltd., & 2 others** Nairobi Misc. App. No. 299 of 2012.

3. That an error in a decision of a judicial officer cannot be dealt with through judicial review but through an appeal or application to review or set aside the decision. The counsel referred to the decided case of **Republic -vs- Chief Magistrate's court Nairobi Milimani Commercial courts. Exparte safaricom limited & 2 others (Supra)**. The counsel therefore submits that the 1<sup>st</sup> Respondent did not exceed the powers granted by the law.

4. That during the hearing in Busia SPM.CC. No.288 of 2000, the 2<sup>nd</sup> Respondent testified that there has been a boundary dispute involving land parcels South Teso/Angoromo/1094, 2292 and 912 which necessitated the redrawing of the boundaries thereof, That whether or not the Applicant's parcel falls within the area indicated in the report by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is a factual issue that would require oral and or documentary evidence to be tendered before a determination and therefore not subject matter of a judicial review application. The counsel referred the court to the decision in **Seventh Day Adventist Church [East Africa] ltd -vs- Permanent Secretary, Ministry of Nairobi Metropolitan Development & Anor** Nairobi. JR Case No. 112 of 2011

5. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted within the powers conferred under section 18 (5), 19 and 20 of the Registered Land Act after the matter was referred to them by the court following the parties failure to have an out of court settlement. The counsel submits that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted within their powers.

6. That if it is true that the Applicant was not involved in the proceedings leading to the report by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the court case before the decision was made, he should have applied to be enjoined in the suit and thereafter applied to have the judgment reversed or set aside as soon as he learnt of the orders.

7. That the application is subjudice Busia HCCA., No 1 of 2003 as both matters relates to the ownership of the same parcels of land and their boundaries and reversal of decision in Busia SPM.CC. No. 288 of 2000. That the court should discourage piecemeal litigation over the same subject matter and common prayers. The counsel referred to the decided case **Republic -vs- Natural Environment Tribunal Exparte Orbit Chemicals Industries & Anor** [2013] eKLR. The counsel further submitted that the Applicant filed Busia CMCC.NO.360 of 2000 against the same Respondents and Interested Parties herein which was dismissed and he filed Busia HCCA. No. 45 of 2011 which is pending. That the multiplicity of suits dealing with the same issues is likely to result to contradicting decisions and the court should stay this judicial review application to pave way for the other matters to be decided first.

8. That the application is said to have been filed on 24<sup>th</sup> May, 2004 pursuant to leave granted on 3<sup>rd</sup> May, 2004. That as Civil Procedure Rules do not apply in computation of time in judicial review matters, the 21 days within which the application was to be filed was inclusive of the day when leave was granted. Therefore the counsel submitted that the 21 days lapsed on 23<sup>rd</sup> May, 2004 and the application was filed outside the 21 days.

9. That the statement filed alongside the application indicates that it was filed in Busia H.C. Misc. App. No. 116 of 2003 on 4<sup>th</sup> June, 2003. That as the Lower court's decision had been made on 4<sup>th</sup> December, 2002 the six months had lapsed by 3<sup>rd</sup> June, 2003 and this means the application for leave was filed outside the six months window contrary to the then Order LIII Rule 2 (Now Order 53 Rule 2) of the Civil Procedure Rules.

10. That the Applicant has not availed evidence to show when the report of the Land Registrar he seeks to quash was made and it is therefore impossible to know whether it had been made within the six months of filing the application for leave. The counsel therefore submits that the proceedings herein are incompetent and invalid.

## **CONCLUSIONS:**

1. That this application calls for this court to exercise its judicial review jurisdiction and the provisions of Order 53 of the Civil Procedure Rules and section 9 of the Law Reform Act are relevant. The provision of Order 53 Rule 2 of CPR requires applications for leave to file an application for the Order of certiorari to be commenced within a period of six months from the date of the order sought to be called to the court for quashing. The period of six months is fixed by the Law Reform Act and Superior courts have time and again stated that the six months period cannot be extended unlike in situations where time for doing something is fixed under the Civil Procedure Rules. [see *Kimanzi Mboo –vs- Mulwa E.A.C.A No. 233 of 1996 and Wilson Osolo –vs- John Ojiambo & Another [1996]eKLR*]

2. That after perusing the court record, I notice that the notice of motion dated 24<sup>th</sup> May, 2004 was filed on the same date under receipt number M767795. I also notice that the application was filed with the following documents:

a) Statement dated 3<sup>rd</sup> June, 2003 and filed on 4<sup>th</sup> June, 2003. To the statement is annexed a copy of a plaint dated 25<sup>th</sup> August, 2000 and defence dated 29<sup>th</sup> August, 2000 in Busia SRM CC. No. 288 of 2000, copy of the Land Certificate and register for land parcel South Teso/Angoromo/1094 in the names of Barasa Kapoloni Akuku. Also annexed to the statement is copy of the plaint dated 4<sup>th</sup> October, 2002, in Busia SRM.CC.NO. 360 of 2000 and court order dated 5<sup>th</sup> March, 2003 issued in the same case.

b) Affidavit sworn by Barasa Kapoloni Auku, the Applicant, on 4<sup>th</sup> June, 2000.

3. That flowing from the finding in (2) above, the Applicant did not attach or annex to the application a copy of the District Land Registrar's and Surveyor's report containing the decision to create an access road on the Applicant's Land parcel South Teso/Angoromo/1094 which he seeks to be called into the court and quashed under prayer 2. The Applicant later filed a further verifying affidavit sworn on 13<sup>th</sup> May, 2014. Even in this latter affidavit, the copy of the District Land Registrar's and Surveyor's report was not annexed. The provision of Order 53 Rule 2 of the Civil Procedure Rules requires applications for leave to be made within six months of the making of the order or decision being challenged. The date of the said Registrar's and Surveyor's report has not been disclosed in the application and in the absence of such a copy being annexed, this court cannot tell the date it was made. The court also notes that though the Applicant submits that he had applied for and obtained leave to file the substantive application, no copy of the leave granted was availed to this court. The court is therefore unable to confirm whether the leave if any, was obtained within six months from the date the Registrar's and Surveyor's report was made. Further the provision of Order 53 Rule 7 (1) of the Civil Procedure Rules do not allow an Applicant to question the validity of an order if he has not lodged a copy of the order with the court or explained his failure to do so. The Applicant herein has not complied with that requirement and is therefore estopped from questioning the validity of the report. For the foregoing reasons, the Applicant's prayer 2 of challenging the Land Registrar's and Surveyor's report fails.

4. That as pointed out in (3) above, the Applicant has not availed a copy of the Order obtained in Busia H.C. Misc . App. No. 116 of 2003, in which leave to file these proceedings was said to have been issued. Whereas I agree with the Applicant's counsel's submissions that the procedure to challenge leave that has been granted is by formally moving the court, and not by submissions in the substantive application's hearing, I am of the considered view that an Applicant has a duty to prove that he/she indeed obtained leave before filing the notice of motion. In this case there is no such proof and this court is unable to confirm whether the leave to file the substantive application was granted and further whether the substantive application was filed within the prescribed time. That as confirmed through the pleadings and submissions filed herein, the judgment which Applicant's seeks to call into this court for quashing in the first prayer was subject of an appeal in Busia H.C.C.A No. 1 of 2003. The Applicant annexed a copy of the judgment in the appeal case in the further verifying affidavit sworn on 13<sup>th</sup> May, 2014. The court has had the opportunity to peruse the judgment and noted that after the

Honourable judge set out the trial court's decision at paragraph 15 he held as follows at paragraph 16;

***“ 16. I have to agree with counsel for the Appellants that this decision was erroneous, first, because the court granted relief and judgment on the basis of matters not pleaded (see Kisumu Civil Appeal No. 234 of 1999 Evan Gundo –vs- Naftali Sule [2002] KLR) In addition, there was no evidence that could support the finding of the Trial court. There was no evidence that Jonathan acquiesced to or encouraged Grace to erect structures on his land. In other words, Grace had not acquired an equity over a portion of plot No. 912. I no doubt appreciate that decision reached by the Learned Magistrate was his sense of justice. However, what was before the court was a temporal dispute requiring the application of property law. Having found that Grace had trespassed onto Jonathan's land parcel 912, the court had no option but to order for her eviction. That may seem a pertinently harsh outcome but the law does not allow otherwise.”***

The court has noted that the copy of the judgment in Busia HCCA. No. 1 of 2003 attached to the Applicant's further verifying affidavit of 13<sup>th</sup> May, 2014 is not complete as some pages are missing. I have on my own volition called for the original appeal file and seen the original and complete copy of the judgment delivered on 19<sup>th</sup> February, 2014.] The impact of the judgment in Busia HCCA. No. 1 of 2003 was to clearly set aside the learned trial Magistrates decision in the judgment delivered on 4<sup>th</sup> December, 2002 in Busia SRM.CC. No 288 of 2003. As such the decision of 4<sup>th</sup> December, 2002 do not legally exist and is therefore not capable of being called into this court for quashing. In place of the orders of 4<sup>th</sup> December, 2002 are now the orders issued by the Honourable judge, in Busia HCCA No. 1 of 2003, on 19<sup>th</sup> February, 2014 which cannot be subject of judicial review jurisdiction of this court. There is also nothing to show that the orders of 19<sup>th</sup> February, 2014 have been successfully appealed against or reviewed or that the orders of 4<sup>th</sup> December, 2002 have been reinstated from the date they were set aside on appeal and substituted. For the above reasons, prayer 1 of the application herein is incapable of being granted.

5. That having found as in (4) above, and further noting that the pleadings and submissions filed herein shows that the Applicant was aware of the existence of the Busia SRM.CC No 288 of 2000 long before he filed the judicial review proceedings, the court is of the considered view that the route to take would have been for Applicant to apply to be enjoined in those proceedings. Alternatively, after the Applicant initiated Busia SRM.CC No.360 of 2000, which is subject matter of Busia HCCA. No. 45 of 2011, he had the option to move the court to consolidate that matter with Busia SRM.CC. No.288 of 2000. This would have accorded him the opportunity to participate in both cases and the appeals emanating thereof. The third option would have been to initiate interested party application in Busia HCCA. NO. 1 of 2003. As the situation is now, and in view of the High court decision of 19<sup>th</sup> February, 2014 in Busia HCCA. No. 1 of 2003, the Applicant cannot question the validity and merit of the Land Registrar's and Surveyor's report which was part of the evidence the Honourable judge considered. [see page 7 and 8 of the judgment dated 19<sup>th</sup> February, 2014 in Busia HCCA. No. 1 of 2003] . For this reason and considering prayer 3 of the application would require evidence to be adduced before it is considered, I find the same cannot be granted in a judicial review application.

6. That for reasons set out above, I find no merit in the application dated 24<sup>th</sup> May, 2004 and the same is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON ...26<sup>TH</sup> DAY OF FEBRUARY, 2015.**

**IN THE PRESENCE OF;.....PRESENT.....APPLICANTS.**

**1<sup>ST</sup> I.P. PRESENT ...RESPONDENTS.**

**MR. ONSONGO FOR APPLICANT.**

**MR. ASHIOYA FOR 1<sup>ST</sup> I.P.**

**MR. OMONDI FOR 2<sup>ND</sup>, & 3<sup>RD</sup> I.P**

**JUDGE.**