



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. JUDICIAL REVIEW NO 20 OF 2009

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN, MBEERE LAND DISPUTE TRIBUNAL.....RESPONDENT

AND

PAUL IRERI KANYOTI.....INTERESTED PARTY

NYONGA MUGO.....APPLICANT

RULING

1. The *ex-parte* applicant has filed this notice of motion dated 22nd December, 2014 supported by an affidavit of the same date which is deponed to by Patrick Muchiri Muchara. The *ex-parte* applicant is seeking the following orders from this court.
 1. An order of certiorari to quash the award of the Mbeere Land District Disputes Tribunal in case number 315/2006 and also to quash the order of the Siakago Resident Magistrate's case in L.D.T no. 3/2008 which adopted the award as a judgement of that court. A similar order is sought to quash the order directing the District Surveyor Mbeere District to subdivide the said land reference no. Evurore/Nthambu/304 into 3 equal portions.
 2. An order of prohibition to issue to restrain the respondents or their agents from executing the award made by the Mbeere District Disputes tribunal in case no. 315 of 200 which was adopted as a judgement by the Senior Principal Magistrate Court at Siakago on 23rd October 2008.
 3. An order that the costs of this application be provided for.
2. The application is opposed by the interested party (Paul Ireri Kanyoti).

The Case for the *Ex-parte* Applicant (Nyonga Mugo):

3. According to the *ex-parte* applicant, the interested party filed a claim over the suit land at the Mbeere Land District Tribunal in case number 315/2006. He claimed a portion of the suit land.
4. The *ex-parte* applicant objected to the claim of the interested party in the suit land. He stated that he was the *bonafide* and lawful owner of the entire suit land number Evurore/Nthambu/304. Evidence was tendered before that tribunal and at the end of the evidentiary hearing, the tribunal made the following findings:
 1. Since the time of demarcation, the suit land had not been registered under any one until 1993 when the same was registered in favour of the applicant.
 2. The land previously belonged to a Mbaririe who had 3 sons including the interested party

- and the applicant's late husband.
3. The registration of the suit land in the name of the applicant was illegal as the other sons of Mbaririe were not involved in the said registration.
 5. The tribunal on the above basis made the following decisions:
 1. That the District Surveyor, Mbeere District is ordered to subdivide the suit land being title No Evurore/Nthambu/304 into 3 equal portions.
 2. The 3 sons of Mbaririe to share the costs of the surveyor.
 6. The award of the tribunal was forwarded to the Magisterial Court at Siakago which adopted it as its judgement.
 7. The *ex-parte* applicant has stated that the tribunal acted *ultra vires* in that it did not have the power to order for the subdivision of the suit land, because the **Land Disputes Tribunal Act number 18 of 1990** (now repealed) does not confer on it jurisdiction to subdivide the suit land. And for that reason, he submits that the tribunal's award was unfair, arbitrary, oppressive and is invalid. He seeks to have it set aside through the issuance of an order of certiorari.

The Case for the Interested Party:

8. The interested party has supported the award made by the tribunal which in turn was adopted as a judgement of the Magisterial Court at Siakago. According to him, the award and its adoption were properly made. He submitted in person stating that the tribunal had power to make the challenged award.
9. Furthermore, he has stated that the tribunal's award was based on the evidence produced before it. He finally submitted that the court should allow him to complete the process of subdividing the suit land in terms of the tribunal's award.
10. The parties were notified of all the rights of appeal to the Provincial Land Disputes Appeals Committee within 30 days starting from 12th June, 2008. No party preferred an appeal to that Appeals Committee.

The Applicable Law:

11. The law that governs this application is found in section 3 of the Land Disputes Tribunal Act number 18 of 1990. The provisions of that section states as follows:

- 3. (1) Subject to this Act, all cases of a 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, shall be heard and determined by a Tribunal established under Section 4.***

12. These provisions have been judicially approved in the case of ***Court of Appeal at Kisumu in Asman Maloba Wepukhulu & Anor v. Francis Wakwabubi Biketi Civil Appeal No. 157 of 200.***

13. It is clear that the Mbeere Land Disputes Tribunal did not have jurisdiction to order for the subdivision of the land into 3 equal portions. It is also clear that it did not have the power to direct the District Surveyor to subdivide the suit land into 3 portions.

Issues for Determination:

14. From the affidavit evidence of the *ex-parte* applicant and submissions of counsel for the *ex-parte* applicant and that of the interested party, the following are the issues for determination:
 1. Whether or not the tribunal had jurisdiction to order for the subdivision of the suit land into 3 equal portions,
 2. Whether or not the tribunal had jurisdiction to order the District Surveyor to carry out the survey and subdivide it into 3 portions.
 3. Whether or not the *ex-parte* applicant has made out the case for the grant of the order of

certiorari and prohibition.

4. Who should pay for the costs of this application.

Evaluation of the Evidence, Submissions, Findings and the Law:

15. I have considered the affidavit evidence of the *ex-parte* applicant. I have also considered the submissions of the *ex-parte* applicant as well as that of the interested party.
16. In the light of the applicable law and having considered the evidence and the submissions, I find that the *ex-parte* was the registered owner of the suit land reference number Evurore/Nthambu/304.
17. In the light of the provisions of section 3(1) of the Land Disputes Act number 18 of 1990, I find that the tribunal did not have jurisdiction to direct the subdivision of the suit land into 3 equal portions. The provisions of that statute were approved in the case of ***Court of Appeal at Kisumu in Asman Maloba Wepukhulu & Anor v. Francis Wakwabubi Biketi Civil Appeal No. 157 of 2001.***
18. In the circumstances, I find that the tribunal did not have jurisdiction to entertain the disputes relating to title and ownership of the said suit land. And for that reason, they acted in excess of their jurisdiction.
19. The only issue is whether the court should issue an order of certiorari directing that the award which was adopted as a magisterial court judgement be brought up to this court for quashing.
20. Additionally, it is also important to decide whether the *ex-parte* applicant is entitled to orders of prohibition as requested in his prayer directing the respondent to stop implementing the award which was adopted as a judgement of the magisterial Court.
21. After taking into account the affidavit evidence, the applicable law and the submissions, I find that the *ex-parte* applicant is entitled to the order of certiorari terms of his notice of motion.

Verdict and Disposal Order:

22. In the light of the foregoing matters, I hereby make the following orders:
 1. An order of certiorari directing the adopted award as a judgement of the magisterial court to be brought up to this court for quashing, which is hereby quashed.
 2. An order of prohibition is not necessary in view of the issuance of an order of certiorari.
 3. The *ex-parte* applicant is entitled to the costs of this motion.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this... 22nd day of ... April...2015

In the presence of the parties.

Court clerk Mr Muriithi.

J.M. BWONWONGA

JUDGE