REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 162 OF 2013

REPUBLIC ..... APPLICANT

VERSUS

1. SENIOR PRINCIPAL MAGISTRATE

KITALE LAW COURT

2. DISTRICT SURVEYOR

TRANS-NZOIA COUNTY & 3 OTHERS ..... RESPONDENTS

3. PHENEAS MULINYA SHAHI ..... INTERESTED PARTY

R U L I N G

1. The ex-parte applicant James Paul Mwasame brought a notice of motion dated 2nd December, 2013 in which he sought an order of prohibition prohibiting the enforcement of a decree dated 30/10/1998 and the subsequent vesting order date 9/3/2009 made in the Senior Magistrate Court at Kitale vide Land Case No. 70 of 1998 concerning Trans Nzoia/Suwerwa/344.
2. The applicant contends that the enforcement of the decree issued on 30/10/1998 is illegal as the same is time barred. The applicant therefore prays for orders of prohibition against the enforcement of the decree.
3. The interested party Pheneas Mulinya Shahi opposed the application through a replying affidavit sworn on 30th December, 2013 in which he contends that the execution of the decree herein is not time barred.
4. I have gone through the ex-parte applicant's application as well as the opposition to the same by the interested party. The present application can be traced to 22/12/1989 when the interested party entered into a sale agreement wherein the ex-parte applicant agreed to sale 3 acres to him. The three acres were to be excised from LR NO. Trans – Nzoia/Suwerwa/344 measuring 9.8 hactares.
5. The ex-parte applicant was reluctant to excise the three acres and give the interested party his three acres. This forced the interested party to file a claim against the Ex-parte applicant before the Cherangani Land Disputes Tribunal. The dispute was heard and decided in favour of the interested party. The verdict of the Tribunal was adopted as judgment of the court vide Kitale Senior Principal Magistrate's Court Land Case No. 70 of 1998. A decree dated 30/10/1998 was duly extracted.
6. The ex-parte applicant was aggrieved by the decision of the Tribunal. He moved to the High Court and filed a judicial review application vide Miscellaneous Application No. 123 of 1998 at Kitale High Court. The ex-parte applicant's lawyers could not prosecute the application for over six years. On 29/11/2004 the application was dismissed as the applicant's lawyer was not in court.
7. On 1/12/2004 the ex-parte applicant filed an application seeking to vacate the orders of

29/11/2004 dismissing his motion. The application was heard and dismissed on a date I cannot be able to tell as the ruling dismissing it is incomplete but it is clear from the judges observations on page 4 of that ruling he/she was not going to allow the same.

8. Following the dismissal of the applicant's application to reinstate the dismissed motion, he moved to the High Court vide Civil suit No. 74 of 2005 in which he sought orders declaring the Tribunal's award and subsequent adoption of the same as judgement of court a nullity. The case proceeded ex-parte and in a judgement delivered on31/10/2006 Lady Justice Wanjiru Karanja now court of Appeal Judge dismissed the suit by the current ex-parte applicant.
9. It would appear that the ex-parte applicant moved again to the lower court in Land Case No. 70 of 1998 and filed an application. I do not know the nature of this application but is is clear from the decree exhibited to the interested party's replying affidavit that the application dated 8/4/2013 was dismissed with costs. The extracted decree was issued on 8/7/2013.
10. It is after the dismissal of the application dated 8/4/2013, that theex-parte applicant moved to court sought leave of court to bring this motion. Leave was granted hence this main motion.
11. The issue which arises for determination is whether an order of prohibition can issue in the circumstances. An order of prohibition is a prerogative remedy which is extraordinary and is only reserved for exceptional cases where there is no adequate remedy. It cannot be allowed to usurp the function of appeal. This remedy is not concerned with the merits of decisions of statutory bodies or tribunals. Where the decision is wrong, the manner of challenging it is through an appeal.

12. In the present case, the ex-parte applicant is contending that the decree cannot be executed because it is more than 12 years since the same was given. Soon after the Tribunal award was adopted as judgement of the court, the ex-parte applicant started the process of Judicial Review. He obtained orders of stay of execution of the decree. The orders remained in force until they were vacated by the court on dismissal of the main motion on 29/11/2004. Soon after this, the ex-parte applicant filed a suit in the High Court which suit was dismissed on 31/10/2006. The interested party then moved the court which gave a vesting order on 9/3/2009. This is the order which the interested party is seeking to enforce. He could not have made any move to execute when there were stay orders in force.

13. If the ex-parte applicant was aggrieved with orders of vesting the three acres upon the interested party, he was free to challenge those orders on appeal.He was also free to challenge the judgement which dismissed his case as well as the refusal to reinstate his dismissed application for judicial review. The applicant has tried all manner of tricks to block the interested party from having his three acres which he legally bought. He cannot come for an order of prohibition as there were avenues for appeal and if he did not go that way, prohibition is not the way to go. I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the interested party.

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of May, 2014

E. OBAGA,

JUDGE

In the presence of Mr Nyamu for the ex-parte applicant and the interested party in person.

E. OBAGA,

JUDGE

19/5/2014