



REPUBLIC OF KENYA

High Court at Busia

Judicial Review 23 of 2009

JACKSON OPONDO MBIYA

CHRISTOPHER OMONDI

REPUBLIC.....APPLICANTS

-VERSUS-

FUNYULA LAND DISPUTE TRIBUNAL

REPUBLIC

PRINCIPAL MAGISTRATE COURT.....REPOONDENTS.

R U L I N G.

Through the amended Notice of Motion dated 9th May, 2012,

OCHIENG OPONDO MBIYA (Representing Jackson Opondo

MBIYA now deceased.) and Christopher Omondi hereafter

referred to as 1st and 2nd Applicants respectively prays for;-

a) An order of certiorari to quash the Butula Land Dispute

Tribunal decision dated 16.03.2009 relating to

Marachi/Bujumba/2 and the orders in Busia PMC. Land Dispute

case No. 99 of 2009 adopting it.

b) That the Butula Land Disputes Tribunal and Busia Principal Magistrate's court be prohibited from further adjudicating on the said land.

c) That the interested party does pay the costs of this application.

The Application is based on the grounds set out on the statement of fact dated 30.11.2009, the verifying affidavit of Jackson Opondo Mbiya sworn on 30.11.2009 and the three grounds on the face of the application as set out herein under;-

“ 1 That the respondent exceeded their mandatory jurisdiction to revoke Succession Cause and ordering for fresh petition of the late Mbiyas estate.

2. That the Butula Land Disputes decision cannot be implemented.

3. That the decision of Butula Land Disputes Tribunal and all subsequent proceedings are bad in Law, null and void ab initio, against the rules of natural justice inter alia and should be quashed and the Butula Land Disputes be prohibited from ever adjudicating on matter touching on Marachi/Bujumba/2 of (or) those related thereto.”

M/S. Ouma – Okutta & Associates Advocate filed notice of appointment for the interested parties on 16.11.2011 and thereafter a notice to raise preliminary objection on a point of law dated 9.3.2012 and filed on 12.03.2012.

Even though Mr. Okutta advocate attended the court on 29.02.2012, 11.06.2012 and 30.01.2013 counsel did not seek to prosecute the preliminary objection. In view of the consent order of 30.01.2013 that the hearing of the substantive motion be disposed of by filing of written submission, the court takes the position that the interested party had abandoned the preliminary objection.

The Applicant filed their submissions on 11.02.2013 but no submissions have to date been filed for the interested party. The Respondents, as is usual in these kind of proceedings, did not participate in the proceedings though served.

I have carefully considered the facts as set out in the papers filed by the Applicant and the submissions by counsel, I have also considered the annexures to the affidavit by Jackson Opondo Mbiya sworn on 30.11.2009 and find the following:-

1. That the certificate of official search marked JOMI shows Land parcel Marachi/Bujumba/2 was registered in the names of Fredrick Samwel Mbiya, Jackson Opondo Mbiya and Christopher Omondi Mbiya on 17th November, 2005.
2. That the registration of the three persons as owners of the Land emanated from a succession cause whose reference was not disclosed in which certificate of succession marked JOMIA was issued. It related to the estate of Mbiya Were and is dated 19.10.1979.
3. That the interested parties namely Milton Oundo, William Okolla Were, Odhiambo Mbiya, Wycliffe Odera and Opiyo Were filed their claim over land Parcel Marachi/Bujumba/2 to Butula Land Dispute Tribunal in March, 2009 against Jackson Opondo (Now deceased) and Christopher Omondi. The Tribunal heard the case and delivered its award which is headed “Judgment” as follows:

“ JUDGMENT.

After hearing both parties plus their witnesses perusal of all the documents presented to us and visiting the disputed parcel of land No..Marachi/Bujumba/2: The elders resolved that:

1. Succession that was done in 1979 is revoked (stopped)
2. New succession to be processed by the following.

i. Milton Oundo Mbiya

.....” This is the award that was allegedly adopted in Busia PMC. Land case No.99 of 2009. I have however been unable to find the proceedings, order or decree issued in Busia PMC Land case No. 99 of 2009 and further note it has not been referred as an annexure in the supporting affidavit.

It is important to establish the extent of the powers of tribunals set under section 4 of the then Land Disputes Tribunal Act No.18 of 1990 which has since been repealed by section 31 of the Environment and Land Court Act No. 19 of 2011. The jurisdiction of the Butula and Disputes Tribunal like any other tribunal of that nature was as limited in section 3 (1) of the Act No.18 of 1990. It stated:

“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 S. 4’

The claim before the Butula Tribunal in relationship to Land parcel Marachi/Bujumba/2 was not among the claims set out in S.3 (1) of Act No.18 of 1990. The award of the Butula Tribunal issued hereof went outside the determination of boundaries claim to work or occupy land. The award disinherited the three registered owners of the land one of who was not even a party in the case. This was Fredrick Samuel Mbiya who was not named as a party and natural justice demands one to be given an opportunity to be heard before adverse orders like those issued by the Butula Land Disputes Tribunal could issue.

The certificate of succession had been issued by the lower court at Busia and the Butula Land Disputes Tribunal did not have appellate powers to sit on appeal of orders from that court. That is the preserve of the High court under the Law of Succession cap 160 of Kenya. To revoke the succession done in 1979 would amount to revoking the title to Marachi/Bujumba/2 which was registered in the names of among others the Applicant. This is a power the tribunal did not possess as this is the preserve of the court under S.143 of the Registered Land Act Cap 300 of Laws of Kenya (Now repealed by the Land Registration Act No. 3 of 2012 at section 109). I concur with the position restated by Honourable Lady Justice R. Lagat – Korir in Kisii H.C. J.R No.135 of 2009 which Applicant’s Counsel referred to court to. The Honourable Judge made reference to the court of Appeal decisions in *Marete –vs- Republic & 3 others* Civil Appeal No.259 of 2000 (2004) eKLR and *Owners of Motor vessel “Lillian S” Caltex (Kenya) Ltd* Civil Appeal No.50 of 1989.

Accordingly I allow the Exparte Applicant’s application by issuing an order of certiorari calling into this court the Butula Land Disputes Tribunal award in respect of Marachi/Bujumba/2 and quashing the same. The said tribunal is also prohibited from dealing with the matter relating to the said parties over the said property. The interested parties will meet the Exparte Applicants costs.

S. KIBUNJA.
JUDGE.
30TH, APRIL, 2013.