



REPUBLIC OF KENYA

High Court at Busia

Judicial Review 5 of 2010

REPUBLIC APPLICANT

-VERSUS-

BUTULA LAND DISPUTES TRIBUNALRESPONDENT

LAWRENCE AINO OSALAINTERESTED PARTY

R U L I N G.

BEATRICE NANGIRA EWA, The Applicant, through her advocate, M/S. Ashioya and company Advocates filed the Chamber Summons application dated 1st April, 2010 praying for:

“1. That an order of certiorari do and is hereby issued to call into the High court and quash the decision of Butula Land Disputes Tribunal over L.R.NO.Marachi/Elukhari/73 made on 7th July, 2009 and adopted by the Principal Magistrate’s court, Busia vide land Case No.59 of 2009 on the 7th July, 2009 before E.O. Obaga, Principal Magistrate.

2. The costs of this application be borne by the Respondents”

The Application sets out three grounds which are:

“ a) That the Butula Land Disputes Tribunal purported to hear a matter outside their jurisdiction by failure to call in section 21 and 22 of the Registered Land Act which provides that all matters of boundary dispute be heard at the Land Registry and surveyor do visit the parcel and file a report before the matter is heard in court or quasi court.

b) That the proceedings from the Tribunal are doctored to give a false impression.

c) That the Tribunal’s decision is aimed at canceling the applicant’s title and is in excess of the Tribunal’s powers conferred upon it by section 3 of the Land Disputes Tribunal.”

The Applicant also filed a statement of facts and Affidavit of support of the same date 1st April, 2010 and they contain the following additional grounds.

1. That though the Tribunal found there was no written agreement of sale it went ahead to award Land Parcel Marachi/Elukhari/73 to the interested party Alex Osala Ondolio.

2. That the Tribunal considered extraneous matters at arriving at their decision.

3. That the Tribunal's decision was ultra vires, illegal and improper.
4. That the Applicant is a first registered owner of L.R.NO. Marachi/Elukhari/73 as evidence by the search certificate attached and marked BNE 3.
5. That the Land Registrar and surveyor, Busia, were in the process of effecting the Tribunal's award.
6. That the interested party had sued her in the Tribunal in relation to a boundary dispute and the Tribunal's award thereof and the court adoption order of the same are annexed as BNE 1 and BNE 2 respectively.

The application is opposed and the interested party Lawrence Aino Osala through his advocates, M/S. Fwaya, Nandwa & company Advocates filed a replying affidavit sworn on 6th May, 2010 deponing on the following:

1. That the Land in question was first registered in the names of his late father Alex Osala Ondolio and has never been lawfully transferred to the Applicant.
2. That the Tribunal had jurisdiction to hear the matter.
3. That the Application for leave and for the substantive orders are fatally defective as they were filed outside the stipulated period and should be dismissed.
4. That the Tribunal's decision being challenged was made on 9th February, 2009 and not 7th July, 2009 as alleged by the Exparte Applicant.

By consent of 19th October, 2010, counsel agreed to proceed with the application by filing written submissions. Counsel for the interested party filed theirs dated 24th November, 2010 on 25th November, 2010 while counsel for Applicant filed their written submissions dated 21st November, 2011 on 20th December, 2011.

A. INTERESTED PARTY'S SUBMISSIONS.

1. That the Tribunal's decision was made on 9th February, 2009 and not on 7th July, 2009. The later date was the date the court adopted the order of the Tribunal. As the application seeks to quash the order dated 7th July, 2009, it therefore lacks merit as it will still leave the Tribunal award of 9th February, 2009 intact and available for execution.
2. That the application for leave was filed on 9th September, 2009 which was outside the six months period from the date of the Tribunal award which was on 9th February, 2009. The leave was improperly granted and the application should be dismissed.
3. That the interested party's claim at the Tribunal was to work on the land which falls within the Tribunal's powers under section 3 of the Land Disputes Tribunal Act No. 18 of 1990 (Now repealed under S.31 of The Environment and Land Court Act No.19 of 2011).
4. That the affidavit filed with the application for leave was not a "Verifying Affidavit" required under Civil Procedure Rule. That the Affidavit in Support and verifying Affidavit filed with the Notice of Motion dated 1st April, 2010 do not also comply with order 53 Rule 1 (2) of the Civil Procedure Rules. That the affidavits should be struck out leaving the applications for certiorari incapable of being sustained.

The counsel referred the court to the following two cases:

1. *R.V. Commissioner for Co-operative Societies Nairobi C.A.C.A* No. 39 of 1997.
2. Eldoret H.C.C.C.NO. R.51 of 1999 *Vallerian Kipngetch Tormoi –V- Francis Kipserem Bett.*

B. EXPARTE APPLICATION SUBMISSION.

1. That the prayer is proper as they seek to have the Tribunal's award adopted by the court quashed.
2. That the delay in filing the application for leave beyond the six months period is not fatal. That what is fatal is filing the substantive application outside the 21 days which cannot be extended.
3. That a decision that is a nullity abinitio can be declared an illegality even if the application is brought outside the six month's period. That the Tribunal's decision to cancel a title deed being outside the powers conferred under section 3 of Land Disputes Tribunal Act was null and void abinitio and should be quashed.
4. That as sections 1A, 1B, 3 and 3A (Civil Procedure Act) obligates the court to do justice without undue regard to technicalities the two affidavits should not be invalidated merely because of not being headed affidavit of verification of facts.
5. That the two cases cited by the interested counsel submissions were made before the introduction of the sections 1A and 1B of the Civil Procedure Act.

The court has carefully considered the submissions of both counsel and all the other materials filed in this case and find as follows:

1. That contrary to the Applicants claim that she was the first registered owner of Marachi/Elukongo/73 the copy of the register to her affidavit of support sworn on 31st March, 2010 shows she got registered with the Land on 31st July, 1986 while the first registration was on 8th October, 1967 in favour of Osala Ondolio.
2. That the copy of the notice from the Tribunal annexed to the Applicants affidavit sworn on 31st March, 2010 and marked BNE 7 and the Tribunal Proceedings marked BNE 1 attached to the affidavit dated 1st April, 2010 clearly shows the claim taken by the interested party and prosecuted before the Tribunal was claim for land Parcel Marachi/Elubongo/73 and not a claim to work on Land.
3. That the Tribunal award or judgment was made on 9th February, 2009 and adopted in Busia PMC Land Case No. 59 of 2009 on 7th July, 2009,
4. That the application for leave was filed on 9th September, 2009 was seven (7) months from the date the Tribunal made their judgment and two (2) months after the court adopted the Tribunal award.

Order 53 Rule 2 of the Civil Procedure Rules provides that application for leave shall not be granted unless applied for before the expiry of six months from the date of the "...judgment order, decree, conviction or other proceedings for the purpose of being quashed". It is important therefore to determine when the parties to the Tribunal hearing got to know of the judgment. The Tribunal proceedings do not contain any entry that their judgment was read to the parties and if so when. It also does not contain any entry that the judgment was communicated to the parties by the tribunal and if so on what date. This court is aware that the practice of the Tribunals was to forward the award to the Magistrate's court and advise the parties to go to the court for the reading of the Tribunal's judgment. Section 7 of the Land Disputes Tribunal Act provided that the Chairman of the Tribunal would cause the decision of the Tribunal to be filed in the Magistrate's court and the court was obligated to enter judgment in accordance with the decision of the Tribunal. Section 8 (1) of the said Act provided a period of 30 days for a party who is dissatisfied to file an appeal to the appeals Committee while S. 8 (9) of the same act provided 60 days for one appealing the decision of the Appeals Committee to the High Court. I

am of the considered view that the time would start to run against the parties from the date the Tribunal of Appeals Committee decision is pronounced to the parties and become available to those interested.

As there is nothing in the Tribunal's proceedings to show that their judgment was pronounced and became available to those parties and those interested before it was read and adopted by the court on 7th July, 2009 it is only fair and just that the period of six months stipulated under order 53 Rule 2 of Civil Procedure Rules be taken to have started running from the date the court adopted the award which is 7th July, 2009. To hold otherwise would result to injustice to the parties wishing to petition the court as the period of more than six months may lapse from the date the Tribunal makes its award to the date it is read or brought to the attention of the parties.

The court therefore finds the application for leave was filed within time and in any case the orders granting leave on 15th March, 2010 have not been repealed against or reviewed. There was filed with the application for leave Beatrice Nangira Ewa's affidavit sworn on 9th September, 2009 headed " Verifying Affidavit and another of the same date headed ""Affidavit." The later contained grounds or facts relied on in support of the application as clearly stated at paragraph 7. When the substantive application was filed on 1st April, 2010, it was filed together with statement of facts and two affidavit headed " Verifying Affidavit" and "Affidavit in support". Order 53 Rule 1 (2) of Civil Procedure Rules provides as follows:

" 1 (2). An application for such leave as aforesaid shall be made ex parte to a judge in chambers and shall be accompanied by a statement setting out the time and description of the applicant, the relief sought, and the grounds on which it is sought and by affidavits verifying the facts relied on."

As shown above the Applicants had complied with the requirements of the above provision and the application is properly before the court.

The court also find that whereas the Applicants application and statement of facts dated 1st April, 2010 state the Tribunal's decision to be quashed was made on 7th July, 2009 the truth of the matter born out of the Tribunals proceeding annexed to the Applicant's affidavit shows the decision was made on 9th February, 2009 and not 7th July, 2009. It must have been possibly due to some oversight or other mistake that the Applicant's counsel quoted 7th July, 2009 as the date of the Tribunal's award. For reasons that are unknown to the court the counsel did not move the court to amend the application as contemplated under order 53 Rule 4 (2) of the Civil Procedure Rules. I will come to this issue later on.

For reasons shown above , the decisions in Commissioner for Co-operatives Societies and Vallerian cases cited by the interested party's counsel are not applicable in the instant case. The Judicial Commission of inquiry into Goldenberg case cited by the Applicant's Counsel affirmed the position that for a party wishing to have a judgment, order, decree, conviction or other proceedings quashed such a party must apply for leave before the statutory period of not more than six months had lapsed. The decision went ahead to find that:

"..... In the view of the court the six months limitation only affects the specific formal orders mentioned and nothing else. The fact of making an ultra vires rule is outside the limitation..."

The issue before the court was a rule made by the Commission to guide its operations which though made more than six months before the application was filed in court for certiorari orders was quashed. The court further went ahead and held:

"...We hold that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of nullities. We further hold in line with Githunguri –V- Republic(1986)KLRI that this court has inherent powers to exercise jurisdiction over tribunals and individuals acting in a administrative or quasi Judicial capacity and we would invoke this jurisdiction to quash nullities and illegalities."

Judicial review orders are among the reliefs the High court can grant under Article 23 of the constitution 2010. Article 159 of the constitution and sections 1A, 1B, 3 and 3A of the Civil Procedure Act obligates this court to emphasize on facilitating the just, expeditious, proportionate and affordable resolutions of Civil disputes without undue regard to procedural technicalities. The materials presented by the Applicants clearly shows the Tribunal's award was on 9th February, 2009 and was adopted by the court on 7th July, 2009. The counsel clearly mentioned this when he made his submission before my brother, Onyancha J, on 15th March, 2010 and his failure to specify the date in the substantive application would not be reasons enough to decline to grant the application if it was otherwise merited. This is especially so as the interested party would not be prejudiced as the correct date was apparent to the parties and both counsel submitted on it. Is the application therefore merited?

Under section 3 (1) of the Land Disputes Tribunal Act (Repealed) the Tribunal powers were limited 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.”

The claim the interested party took to the Tribunal and which the tribunal made a decision on was clearly outside the ambit of the powers given to the tribunal by the statute. The Tribunal decision of 9th February, 2009 was in the following words:

“ (a) The selling and buying of land parcel No. Marachi/Elukongo/73 is hereby revoked and the title deed Marachi/Elukongo/73 in name of Beatrice Nangira Ewa deceased null and void because it was fraudulently obtained.

(b) Land parcel No. Marachi/Elukongo/73 returns to the owner the late Alex Osala Ondolio (succession to be processed by the family of Alex Osala)

(c) Costs to be met by Beatrice Nangira Ewa (Objector).”

It is clear the orders issued in (a) and (b) above by the Tribunal was outside its powers and are therefore null and void abinitio. This is therefore an appropriate case for the court to grant the orders of certiorari and the following orders are hereby granted:

1. That an order of certiorari is hereby issued and the Butula Land Disputes Tribunal decision over L.R. No. Marachi/Elukongo/73 and adopted in Busia PMC. Land case No. 59 of 2009 on 7th July, 2009 is called to this court and quashed.
2. That the interested party will pay the costs of this application.

S. KIBUNJA
JUDGE.
23RD MAY, 2013.