



REPUBLIC OF KENYA

High Court at Busia

Judicial Review 8 of 2008

REPUBLIC APPLICANT.

= VERUS=

BUSIA MUNICIPALITY LAND

DISPUTE TRIBUNALRESPONDENT

OGUTU OGAYO AGUDA INTERESTED PARTY

R U L I N G.

The Exparte Applicants, **MR. PIUS MALOBA ONYANGO** and **FELISTA MALOBA ONYANGO**, hereinafter referred to as 1st and 2nd Applicants, through M/S. Ashioya & company Advocates, obtained leave to file the substantive application on 2nd December, 2008. The substantive application by way of Notice of Motion was filed on 19th December, 2008 and is for:-

1. That an order of certiorari do issue quashing the decision of Busia Municipal Land Disputes Tribunal on Samia/Bujwanga/919 of 14th, February, 2008 and adopted in Busia PMC Land case No.3 of 2008 on 14th February, 2008.
2. That the costs of the application be met by Respondents.

The application is supported by the 1st Applicant affidavit sworn on 19th October, 2008 and statement of facts dated 5th March, 2008. It is based on the three grounds on the face of the application which are:-

“ a) That the Busia Municipality 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 a 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 decision is aimed at cancelling the Applicant’s title and it is in excess of the Tribunal’s powers conferred upon it by section 3 of the Land Disputes Tribunal Act”.

The 2nd Applicant, Felista Akoth Maloba, filed an affidavit headed “Replying Affidavit” sworn on 15th January, 2009 disputing that she had mandated the 1st Applicant to file the application.

Mr. Ogutu Oyayo Agunda, the interested party, opposed the application through a replying affidavit sworn on 3rd, February, 2009 filed through M/S. J.S. Khakula & company Advocates.

The record shows that on 8th, November, 2011. counsel by consent agreed to file written submissions. The applicant's counsel filed their written submission on 24th January, 2012.

The 1st Applicant in his affidavit sworn on 19th December, 2008 deponed on the following facts among others:

1. That he had the mandate of 2nd Applicant to make the averments therein.
2. That interested party sued him before Busia Municipality Land Disputes Tribunal over a boundary for Samia/Bujwanga/919 and the tribunal made an award which was adopted by the lower court.
3. That he be objected as the land had been registered with his father as a first registration.

(He claims to have attached a search certificate marked PMO 3 but none was annexed).

4. That the Tribunal's award was in excess of its jurisdiction.

The statement of facts dated 5th March, 2008, among others, indicated that Samia/Bujwanga/919 was registered in the names of Maloba Onyango who is deceased, and that he had not been appointed the administrator of the deceased's estate. That the interested party sued on behalf of Agostino Agunda who is deceased and hence he had no legal right to institute such a suit.

The 2nd Applicant in her affidavit of 15th January, 2009 stated among others that :-

1. That she had not mandated the 1st Applicant, Pius Maloba Onyango to file the Notice of Motion dated 4th March, 2008.
2. That her husband and herself had not bought the land in question but had been allowed to use it for farming by one Agostino Agunda now deceased.
3. That the Tribunal award adopted by the lower court stands.

The interested party in his replying affidavit of 3rd February, 2009 states among others:

1. That Land parcel Samia/Bujwanga/919 belonged to his late father Agostino Agunda who died intestate in 1969 and no succession cause of the estate has been filed.
2. That the Applicants, who are son and widow respectively of the deceased Alexandra Maloba Onyango who died in 1986 have not been appointed administrators of Maloba's estate and lacks capacity to litigate in these proceedings.
3. That Alexandra Maloba Onyango and his wife the 2nd Applicant had been allowed by his father Agostino Agunda to farm on the land in question up to 1986 after which they stopped them. He referred to two letters dated 14th July, 2006 and 9th July, 2007 which are annexed to the affidavit.
4. That 1st Applicant declined to attend the hearing before the Chief and the Funyula Land Disputes Tribunal and the matter was referred to the Busia District Commissioner.
5. That, the District Commissioner appointed another panel that included one James Ajoka who is related to the 1st Applicant after which due to the conflict of interest the matter was referred to Busia Municipality Land Dispute Tribunal who heard the matter without any party raising any objection.

4. That Samia District was created in 2008 when the matter had already been heard exhaustively by the predecessor Busia District Tribunal.

5. That Alexandra Maloba Onyango was never a neighbour to their parcel of land for these to have arisen a boundary dispute.

I have carefully considered the contents of the affidavits referred to hereinabove and it is important to restate some of the observations. First that the 1st Applicant appears to have filed these proceedings without the consent or knowledge of his mother the 2nd Applicant. The 2nd Applicant by her affidavit of 15th January, 2009 and filed on 20th January, 2009 indicated she was satisfied with the decision of the Tribunal as adopted by the court.

Secondly, the Tribunal proceedings had been initiated by the interested party and had named both Applicants as Defendants. The Tribunal award which was adopted by the court required the Defendants to surrender back the land. It stated:

“ The Defendants to surrender back the whole piece of land in dispute formally belonging to the late Agostino Agunda which was fraudulently obtained by the late Maloba Onyango.”

None of the parties in the Tribunal case, who are also the parties in this case, exhibited any grant appointing either of them as administrators of the estate of the said Agostino Agunda or Maloba Onyango. If the claim before the tribunal was for ownership or distribution of a property registered in the name of a deceased person, then under the law of Succession Act Cap 160 of Law of Kenya, a succession cause needed to be filed in a court of law and not the Tribunal. Also if the Applicants herein intend to claim a property they believe belonged to Alexandra Maloba Onyango then they needed to first file a succession cause for his estate and be appointed administrators of his estate. The parties herein have not been appointed as administrators of the respective deceased's estate nor have they obtained the grant to cloth them with capacity to sue or be sued on behalf of the said estates.

Thirdly, as the copy of the register or certificate of official search in respect of Land parcel Samia/Bujwanga/919 were not availed to the court by any of the parties, the court is not in a position to make a finding as to who is the registered owner of the land or its history of ownership. There is nothing in the copy of proceedings before the Tribunal or the lower court to show whether such documents were exhibited during the hearing before them.

Lastly, the court do not find anything in the tribunals award and in the lower court order adopting the award that indicates that the Applicant's title to the land was to be cancelled. All the Applicants were required to do was to surrender back the land and from the testimony of 2nd Applicant, they stopped using the land for farming after her husband died. Under section 3 (1) of the then Land Disputes Tribunal Act (Repealed under section 31 of the Environment and Land Court Act No. 19 of 2011) the powers of the tribunal were 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 interested party has in the replying affidavit explained how the matter was referred to Busia Municipality Land Disputes Tribunal instead of being heard by Funyula Land Disputes Tribunal. These averments on factual issues were not disputed or challenged on evidence by the Applicants and the court finds the reasons given to be reasonable. The award is signed by a chairman and two members which confirmed with section 4 of the said Act on the minimum membership of a tribunal.

I find counsel for the interested party in their submissions indicates that the tribunal award was implemented on 3rd March, 2008 when the title was transferred to the interested party's name. Even though this would amount to giving evidence in unconventional manner it would mean the Tribunal Award was taken to mean it had decided on who owns the land in question. This would be against the clear provisions of the law as it goes against law of Succession Act Cap 160 of Laws of Kenya which offers guidance on dealing with properties of deceased persons and S.159 of the then Registered Land Act Cap 300 of Laws of Kenya now repealed under the land Registration Act No. 3 of 2012.

The Tribunal had acted beyond its powers and the application dated 5th March, 2008 is allowed in terms of prayer 1 with costs to the 1st applicant.

S. KIBUNJA.

JUDGE,

15TH MAY, 2013.