

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC. CIVIL APP. (JR) NO.22 OF 2011

CLEMENTINA NEKESA NAMENGE.....EXPARTE APPLICANT

VERSUS

BUTULA LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

**CHRISPINUS ODUOR OCHIENG.....INTERESTED
PARTY**

J U D G M E N T

The Interested Party herein lodged a claim at the Butula Land Disputes Tribunal (the tribunal) seeking to be declared the owner of the parcel of land known as LR. No. Marachi/Elukhari/2217 (hereinafter referred to as the suit parcel of land). This parcel of land is registered in the name of the Exparte Applicant. The Exparte Applicant was the Respondent in the case before the tribunal. After hearing the case, the tribunal awarded the Interested Party the entire parcel of land. The tribunal ordered the Exparte Applicant to relocate to a neighbouring parcel of land registered as LR. No. Marachi/Elukhari/2218. It was common ground in this case that that parcel of land is registered in the name of Josephine Nangira Opekete, the Exparte Applicant's co-wife. The Exparte Applicant was aggrieved by the decision and sought leave of this court to commence Judicial Review proceedings in the nature of certiorari with a view to bringing to this court the decision of the said tribunal with the objective of having the same quashed. Leave to institute Judicial Review proceedings was granted by this court.

The Exparte Applicant filed a substantive notice of motion in which she sought an order of certiorari to quash the decision of the tribunal and that of the Principal Magistrate's Court Busia which adopted the tribunal's award as the judgment of the court. The grounds in support of the application for Judicial Review are stated on the face of the application. The Exparte Applicant contends that the tribunal had no jurisdiction to entertain the matter and the award made was therefore a nullity. She was aggrieved that the tribunal had ordered her out of her parcel of land and ordered her to go to the parcel of land of another person who had not been made a party to the suit. She challenged the decision of the tribunal because it contradicted the decision made by the court in Succession Cause No.33 of 1991. She accused the tribunal of fabricating the record to indicate that she had attended proceedings yet in actual fact she did not participate in the same. It is for the above reason that the Exparte Applicant urged the court to quash the decision of the tribunal. The Interested Party was served with the application but did not file any papers in opposition to the application for Judicial Review.

During the hearing of the application, both the Exparte Applicant and the Interested Party attended court. The Exparte Applicant reiterated the contents of the application and the pleadings filed in support of the same. The Interested Party on his part made oral submission urging the court to uphold the decision of the tribunal. The issue for determination by this court is whether the Exparte Applicant made a case for this court to grant her the order of Judicial Review of certiorari that she craves for. Certain facts are not in dispute in this case. It is not disputed that the Exparte Applicant is registered as the owner of the suit parcel of land. She has annexed a copy of the title of the parcel of land which was issued to her on 25th April 2007. The Exparte Applicant is the first registered owner of the said parcel of land. The said parcel of land was a subdivision of a parcel of land which was registered as LR. No. Marachi/Elukhari/95. This

parcel of land was previously registered in the name of John Oyamo Otsieno, the late husband of the Exparte Applicant. It is not disputed that the Busia Magistrate's Court in Succession Cause No.33 of 1991 allowed the Exparte Applicant to inherit the suit parcel of land. The other sub-division from the original parcel of land was inherited by the Exparte Applicant's co-wife known as Josephine Nangira Opekete. This is the parcel that is registered as LR. No. Marachi/Elukhari/2218. It is this parcel of land that the tribunal in its misguided wisdom ordered the Exparte Applicant to relocate to. The Interested Party claims that the late husband of the Exparte Applicant held the suit parcel of land in trust for his late grandfather. The question this court asked itself is that, why didn't the Interested Party sue both widows of the deceased before the tribunal?

It is clear from the foregoing that the tribunal exceeded its jurisdiction when it purported to determine a succession dispute. If the Interested Party has a case against the estate of the deceased's husband of the Exparte Applicant, he should lodge his claim in succession cause that authorized the Exparte Applicant to inherit the suit parcel of land. In any event, the tribunal exceeded its jurisdiction, in fact it acted ultra vires its powers, when it made an award directing the Exparte Applicant to relocate to a parcel of land that belonged to a third party who had not been made a party to the suit. The manner in which the tribunal conducted the proceedings reeks of a hatchet job on behalf of the Interested Party. It appears that the tribunal went out of its way to ensure that the Interested Party got the Exparte Applicant's parcel of land without any regard to the law or to the customs of the community where both parties come from. This court got the feeling that the tribunal was assisting the Interested Party to disinherit a helpless widow who happened not to have been blessed with children. This court cannot countenance that.

The upshot of the above reasons is that the Exparte Applicant has made a case for this court to issue the Judicial Review order of certiorari. The Butula Land Disputes Tribunal's award which was made on 7th July 2011 is brought to this court for the purposes of quashing and the same is accordingly quashed. The decision of the Senior Principal Magistrate's Court Land Case No.84 of 2011 in adopting the said award as the judgment of the court is set aside and substituted by an order of this court dismissing the same. The Exparte Applicant shall have the costs of this application and the application seeking the leave of this court to institute Judicial Review proceedings. For the avoidance of doubt, the Interested Party is ordered to vacate the suit parcel of land with immediate effect or in default he be evicted therefrom. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 30TH DAY OF JULY 2013.

F. TUIYOT

JUDGE