



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**MISC. CIVIL APPLICATION CASE NO. 84 OF 2010**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION BY SIMON MIKAE SAISI FOR AN ORDER OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**AND**

**IN THE MATTER OF THE KANDUYI LAND DISPUTES TRIBUNAL DISPUTES NO. 26 OF 2009**

**REPUBLIC..... APPLICANT**

**VERSUS**

**THE CHAIRMAN KANDUYI LAND DISPUTES TRIBUNAL.....RESPONDENT**

**AND**

**ELIZABETH NEKESA NDOMBI .....1ST INTERESTED PARTY**

**BEATRICE NANJALA JUMA .....2ND INTERESTED PARTY**

**EXPARTE**

**SIMON MIKAE SAISI ..... APPLICANT**

**JUDGMENT**

The exparte applicant brought a notice of motion seeking orders that;

(a). The honourable court be pleased to grant orders of certiorari to remove into the honourable court and quash the decision of Kanduyi Land Disputes Tribunal case No. 26 of 2009 read and adopted as judgment of the court on 21.5.2009 vide Bungoma land case No. 17 of 2010.

(b). Costs of the application be provided for.

The motion is based on grounds on the face of it and on the affidavit of the ex parte applicant. The motion is opposed by the 1st interested party. She filed a replying affidavit. The 2nd interested party passed on before conclusion of this matter and on 30th May 2013, the claim as against her was withdrawn by the ex parte applicant. The gist of the applicant's claim is set out at paragraph 8 of the supporting affidavit i.e the Tribunal's decision meant that the applicants title no **E. Bukusu/S. Kanduyi/13676** will be landlocked. It is his case that the Tribunal had no jurisdiction to adjudicate on matters relating to title and access road to the said title. He annexed the proceedings of the Tribunal to the said affidavit.

The 1st interested party in her replying affidavit contend the Tribunal had jurisdiction to entertain the matter before it. The proceedings before the Tribunal did not touch on title to land. The 1st Interested party also aver the land in question during the proceedings was **E. Bukusu/S. Kanduyi/10540**; while the land referred to in the notice of motion is **L.R E.Bukusu/S.Kanduyi/13676** which is different hence the supporting affidavit raises new issues that were not adjudicated before the Tribunal.

The ex parte applicant and the 1st interested party filed their respective written submissions. The applicant in his submissions claimed the Tribunal was wrong in entertaining a matter that was time barred and res judicata as it had been adjudicated in Bungoma Land Disputes Tribunal case No. 7 of 2005. Secondly, the 1st interested party did not have locus hence the claim before the tribunal was a nullity. He introduced new land parcel numbers. He concludes by saying that the award gave the 2nd interested party one acre of land from the applicants parcel **E. Bukusu/S/ Kanduyi/13676**. They have cited and annexed several case law to support the submissions. The proceedings in No 7 of 2005 were not annexed to the application although it is my considered opinion that *Res Judicata* does not apply to proceedings before tribunals. There was no submission on the issue of locus of the 1st interested party.

The 1st interested party maintained the applicant is referring to a different parcel of land than the one adjudicated upon by the Tribunal. She also submitted that the Tribunal had jurisdiction as the matter was a boundary dispute. She urged the court to dismiss the motion with costs to her.

I wish to point out at the outset that in Judicial Review proceedings, the court does not touch on the merits of the case (*see Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civ Appeal no 185 of 2001*) but only if the Tribunal exceeded its powers as granted to it under Section 3 (1) of the Land Disputes Tribunal Act (*repealed*). The decision sought to be quashed is reproduced hereunder;

1. The claimant has a right of her claims and the panel of elders unanimously award her the disputed piece of land measuring 12" x 100" and the balance of Kshs. 70,000/= to be paid by the objector as per the chief's ruling stands.
2. The panel of elders recommends Mrs. Beatrice Nanjala Juma the purchaser of the disputed land measuring 12" x 100" to develop it as the owner of the parcel.
3. The objector should desist from further intimidation taking advantage of the claimants illiteracy to psychological molest and the provincial administration is requested to observe her security.
4. The objector to meet the costs of the case.
5. Enclosed document marked CL, OB and EX produced as evidences.

In the heading of the proceedings the parcel of land under dispute is L.R. E. Bukusu/S. Kanduyi/10540. According to the applicant, this title is no longer in existence as it was closed on subdivision. He had also submitted that if the award is executed, his parcel will be landlocked. I deduce therefore that the applicants worry is the 1st interested party sold a portion of land to the 2nd interested party which portion comprises part of the access road to his plot. It cannot therefore be true submission by the applicant that the award was directing him to carve out one acre of land to the 2nd interested party. It would eat up the access road.

I agree with the 1st interested party that the applicants title L.R. No. E. Bukusu/S. Kanduyi/13676 was not being adjudicated upon before the tribunal. What appears to have been issue is the boundary between E. Bukusu/S. Kanduyi/13676 and a land portion measuring 12” by 100”. It is not clear from the decision of the tribunal on which title the portion 12" by 100" was to be created from. Although the Tribunal did not exceed its mandate in all the limbs of the award, for instance, the award in paragraph 3 basically was for parties to maintain peace and cannot be stated to exceed jurisdiction.

There was no mention of the applicant's title in the award as adopted in the court. However from the annexed green card for L.R 10540, this title was closed on subdivision on 8th Nov 2002, therefore the proceedings before the tribunal were void for it arbitrated over land parcel number that had changed into new numbers and mutated. Executing the award meant the register would be rectified to reflect the old no. of L.R 10540. This in my view was exceeding jurisdiction and necessitates the calling of the decision of the Tribunal into this court for purposes of quashing.

In reference to the authorities cited, in Bungoma Misc. Civil No. 8 of 2007, the matter in issue related to a property where the proprietor is deceased. In the Bungoma Misc. Civ. Case No. 6 of 2007, the Tribunal gave orders directly subdividing the exparte applicants land. In the instance case, although the award does not interfere with the applicants title directly, but it inteferes with register of the mother title.

The court of appeal decision in Civil Appeal No. 259 of 2000, the decision sought to be quashed was based on award that gave land to the appellatant on basis of trust which again is not applicable to the present motion. This case law relied on by the exparte applicant is therefore distinguishable.

Consequently from the explanations given above, I find this application as has merit and proceed to allow it. I order that each party to bear their own costs.

**JUDGMENT DATED, SIGNED, READ AND DELIVERED** in open court this 17th day of July 2013.

**A. OMOLLO**

**JUDGE.**