

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC. CIVIL APP. NO.4 OF 2009

BENJAMIN OKELLO SEMBE.....APPLICANT

VERSUS

FUNYULA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

BUSIA PRINCIPAL

MAGISTRATE.....2NDRESPONDENT

AND

**LUCAS OUMA MABACHI.....INTERESTED
PARTY**

JUDGMENT

Lucas Ouma Mabachi, the Interested Party herein lodged a case before the Funyula Land Disputes Tribunal (the tribunal) seeking determination in respect of a parcel of land registered as LR.No.Samia/L.Bukhulungu/225. The Interested Party claimed that the Applicant had obtained registration of the suit parcel of land fraudulently from his late father, Gabriel Mabachi who died in 1992. The Applicant did not participate in the proceedings before the tribunal. After hearing the Interested Party and his witnesses, the tribunal made an award in favour of the Interested Party. It directed the Busia District Land Registrar to revoke the title that was issued to the Applicant. It further directed the Interested Party to petition the court to be issued with a grant of letters of administration in respect of the estate of his deceased father after which the suit parcel of land would be registered in his name (the Interested Party's). The tribunal further ordered the Applicant not to interfere with the possession of the Interested Party of the suit parcel of land. The decision of the tribunal was rendered on 11th November 2008. It was sent to the court on 21st November 2008. It was adopted as the judgment of the court on 18th December 2008.

On 30th January 2009, the Applicant sought to be granted leave by this court to institute the judicial review proceeding in the nature of certiorari to bring to the court and to quash the award of the tribunal. The Applicant further prayed for a judicial review order of prohibition to prohibit the Busia Principal Magistrate's Court from executing the said award. After considering the application for leave, the court did on 2nd July 2009 grant leave to the Applicant to institute the said judicial review application for certiorari and prohibition. The Applicant filed the substantive motion on 21st July 2009. In the said application, the Applicant seeks judicial review orders of certiorari and prohibition essentially to quash the award made by the tribunal and to prohibit the Principal Magistrate from enforcing the said award. The grounds in support of the application are stated on the face of the application. The Applicant contends that, being the registered owner of the suit parcel of land, the tribunal lacked jurisdiction to order the cancellation of his title. The Applicant states that the tribunal made the said award in breach of the principles of natural justice. The application is supported by the affidavit of the Applicant.

The application is opposed. The Interested Party swore a replying affidavit in opposition to the application. Whereas he conceded that the Applicant is the registered owner of the suit parcel of land, the Interested Party deponed that the land previously belonged to his grandfather and had been transferred to his late father Gabriel Mabachi who died in 1992. He swore that the Applicant had obtained registration of the suit parcel of land purportedly as a gift from his deceased father in circumstances that were unclear

because his deceased father could not have transferred the entire parcel of land to the Applicant without taking into consideration the fact that he had his own children who resided on the land. He urged the court to dismiss the application in court.

At the hearing of the application, this court heard rival oral submission made by Mr. Jumba for the Applicant and by Mr. Otanga for the Interested Party. This court has carefully considered the said submission and the written submission earlier filed by the said counsel. The issue for determination by this court is whether the Applicant made a case for this court to grant the judicial review order of certiorari and prohibition craved for in the application. The first issue that this court will have to grapple with is whether the tribunal had jurisdiction to make the award that it did. Under **Section 3(1)** of the **Land Disputes Tribunal Act** (now repealed), the tribunal had jurisdiction to hear matters of a civil nature involving a dispute as to the division of, or the determination of boundaries to land, including land held in common, a claim to occupy or work land and trespass to land. It is evident that the tribunal did not have jurisdiction to order the cancellation of a title to land that had been issued to the Applicant.

The tribunal did not have jurisdiction to direct the court that will hear the succession that will be filed by the Applicant to distribute the suit parcel of land to the Applicant. It was clear that the tribunal exceeded its jurisdiction when it purported to make such orders. However, it was apparent from the evidence that was placed before the tribunal that the circumstances under which the Applicant came to be registered as the owner of the suit parcel of land is questionable. This is because the previous owner of the land (the Applicant's paternal uncle) could not have transferred the entire parcel of land to his nephew to the exclusion of his own children. This court has perused the instrument of transfer that was used to transfer the suit parcel of land to the Applicant. The previous owner, the deceased father of the Interested Party, was illiterate. He signed the transfer by appending his thumb print. There was no consideration paid by the Applicant. It was claimed that the land was transferred to him as a gift. What was interesting was that despite this transaction, the deceased and the members of his family have continued residing in the land. The Interested Party has a case when he alleges that the transfer was obtained under circumstances that clearly points to either undue influence or fraud.

In the circumstances therefore, this court holds that the Applicant established a suitable case for this court to grant the application for judicial review. The award of the tribunal made on 11th November 2008 is brought to this court for the purposes of quashing the same. The same is quashed by an order of certiorari. The Principal Magistrate is prohibited from executing the said award by an order of prohibition. In light of the circumstances of this case, this court shall not award any costs to the Applicant. Each party shall bear their costs. The Interested Party is advised to pursue his claim before the proper forum, which is Land and Environment Court. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF AUGUST 2013.

F. TUIYOT

JUDGE