



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
MISC. CIVIL APP. NO.48 OF 2002

MARIAM ALOO OKWARO.....APPLICANT

VERSUS

FUNYULA LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

CATHERINE NDUBI OKWARO.....1ST-INTERESTED PARTY

MARY MUDONDO OKWARO.....2NDINTERESTED PARTY

AND

**ISAAC METHOD OKWARO.....
.....SUBSTITUTE**

JUDGMENT

Catherine Ndubi Okwaro (the 1st Interested Party), Mary Mudondo Okwaro (the 2nd Interested Party) and Maria Aloo Okwaro (Deceased) (and who was substituted by Isaac Method Okwaro) are the widows of one Kanuti Pius Okwaro (the deceased). A dispute arose among the three widows of the deceased in respect of the right of occupation of the parcel of land registered as LR.No.Samia/Wakhungu Odiado/1211 and 1212. The dispute was referred to the Funyula Division Land Disputes Tribunal which rendered its decision in 2001. The decision, *inter alia*, made an award to the effect that the parcel of land LR.No. Samia/Wakhungu Odiado/1212 which had been registered in the name of Maria Aloo Okwaro be cancelled and a new sub-division be done so that the interest of all the widows of the deceased and their children be taken into account. The tribunal’s award was filed in court on 19th September 2001. It was adopted as the judgment of the court on 5th December 2001.

On 20th May 2002, Mary Aloo Okwaro sought the leave of this court to apply for an order of certiorari to bring into this court:

“the order made by the Senior Resident Magistrate at Busia on 5.12.2001 adopting the award of Funyula Land Disputes Tribunal as the judgment of the court in Busia Senior Resident Magistrate’s Court Land Case No.36 of 2001.”

It is clear from the prayer sought by the Applicant that she did not seek to challenge the award made by Funyula Land Disputes Tribunal but rather the order of the Senior Resident Magistrate that adopted the

said tribunal's award as the judgment of the court. The reason for this strange application may be explained by the fact that by the time the Applicant sought the leave of the court, the statutory period of six (6) months within which she was supposed to have sought the leave had expired (see **Section 9(2)** of the **Law Reform Act**). Leave was granted by this court on 4th February 2003. The Applicant filed the substantive motion on 25th February 2003. Just like the application seeking leave, the Applicant sought for an order of certiorari to bring into this court, for the purpose of quashing the same, the order made by the Senior Resident Magistrate on 5th December 2001 in adopting the tribunal's award made by the Funyula Land Disputes Tribunal. Upon being served, the Interested Parties duly entered appearance. This court has not seen any replying affidavit filed by them in opposition to the application. The Applicant died on 8th November 2003. She was substituted by Isaac Method Okwaro on 4th May 2009.

Counsel for the parties to this application agreed by consent to file written submission. The said submission was highlighted before this court by Mr. Manwari for the Applicant and by Mr. Fwaya for the Interested Parties. Mr. Manwari submitted that the Funyula Land Disputes Tribunal did not have jurisdiction to cancel a title which had been issued to the deceased applicant. He cited **Section 3(1)** of the **Land Disputes Tribunals Act** (now repealed) in support of his submission. He took issue with the challenge made by the Interested Parties which was to the effect that the Applicant had not sought the leave of the court to challenge the decision of the Land Disputes Tribunal but rather had sought leave to challenge the decision Senior Resident Magistrate's Court in adopting the award as the judgment of the court. He submitted that the Applicant had indeed sought leave to challenge the decision of the Funyula Land Disputes Tribunal within the specified period. He urged the court not to be persuaded by the legal technicalities raised by the Interested Parties to defeat the Applicant's claim. He submitted that Isaac Okwaro was properly substituted to pursue the claim on behalf of the estate of the deceased applicant. This was after the court had issued a limited grant of letters of administration intestate allowing the said Isaac Okwaro to substitute the deceased applicant. He urged the court to allow the application.

Mr. Fwaya for the Respondent urged the court to dismiss the application, because, in his view the decision of the Funyula Land Disputes Tribunal had not been challenged. It was his submission that the court would be acting in vain if it quashed the decision of the Senior Resident Magistrate adopting the award of the Funyula Land Disputes Tribunal without quashing the award itself. He argued that the Applicant had in fact not obtained leave before instituting the substantive motion for judicial review. He further argued that the substantive motion was improperly filed in court and therefore should be dismissed. He submitted that the award of the tribunal dealt with issue of occupation by the three widows of Kanuti Okwaro (Deceased) and therefore such issue was within the jurisdiction of the tribunal. He urged the court to dismiss the application but with no orders as to cost as the dispute involved members of the same family.

This court has considered the facts of this case. This court agrees with the submission made by the Interested Parties that the application before this court did not seek to challenge the decision of the Funyula Land Disputes Tribunal but rather the adoption of the said decision by the Senior Resident Magistrate, Busia. Since the Applicant did not challenge the decision of the Funyula Land Disputes Tribunal, it was not open for the Applicant to make submission challenging the said award. It was apparent from the proceedings that the Applicant was out of time and could not therefore file an application for judicial review to challenge the decision of the Funyula Land Disputes Tribunal. The Busia Senior Resident Magistrate, in adopting the said award as the judgment of the court, was not making any decision. The Senior Resident Magistrate was performing a function which in effect formalized the award of the Funyula Land Disputes Tribunal as the judgment of the court to enable the successful party execute the award. The Applicant having not challenged the award of the Funyula Land Disputes Tribunal, there is no competent application before this court for judicial review to enable this court determine whether or not the said tribunal acted in excess of its jurisdiction.

The upshot of the above reasons is that the Applicant's application for judicial review lacks merit and hereby dismissed. Since the Interested Parties did ask for costs, the appropriate order for this court to issue is that there shall be no orders as to costs. Each party shall bear their own costs.

L. KIMARU

JUDGE

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

F. TUIYOT

JUDGE