



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW NO. 1 OF 2010

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN, LAND DISPUTES

TRIBUNAL LURAMBI DIVISION RESPONDENT

AND

HARUN MWELESA AFANDI INTERESTED PARTY

EX-PARTE GAITANO LISUTSA MUKOFU

RULING

This is a judicial review application brought by way of Notice of Motion dated 4th January, 2010, and filed on 5th January, 2010. The Notice of Motion was filed under Order 53 rule 3 (1) of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act (Cap. 26). The prayers sought are as follows -

1. An order of certiorari to remove into the High court for the purpose of being quashed the decision of Lurambi Land Disputes Tribunal made in Land Dispute Case No. 112 of 2009 dated 18th September, 2009.
2. An order for costs of this application.

Before the application was filed, leave was granted by the court on 15th December, 2009.

Subsequent to filing the Notice of Motion, the ex-parte applicant was granted leave to file a further affidavit. That leave was granted on 21.2.2013. The further affidavit was filed on 1st March 2013. Thereafter, the applicant's counsel C. O. Samba & Company advocates, filed written submissions in support of the application.

The respondents did not file any response to the application, though the Attorney General had on 12th April, 2010 entered appearance for them.

The interested party, on the other hand, filed a replying affidavit to the application on 25th May, 2011. The interested party also, through counsel E. K. Owinyi & Co. advocates filed written submissions on 11th July, 2011 in opposition to the application.

Ms Andia for the applicant and Mr. Nyikuli for the interested party who appeared on the hearing date

relied on the written submissions filed. I have perused the said submissions.

The first complaint by the interested party is that the application is fatally defective because the verifying affidavit did not comply with the requirements of Order 53 rule 1 (2) of the Civil Procedure Rules. Therefore in his view, the Notice of Motion filed was fatally defective. The interested party does not however state in what particular way the said affidavit did not comply with the Civil Procedure Rules. Having perused the said affidavit, I do not see any defect on the same. The law requires the affidavit to contain the facts relied upon. Though the affidavit is brief, it annexed a copy of the subject Land Dispute Tribunal proceedings. The further affidavit only attempted to highlight the details surrounding the dispute. I find no defect on either the original verifying affidavit or the further affidavit. In my view, both affidavits are proper in form and substance. I dismiss the complaint by the interested party.

The major issue raised is whether the decision of the Land Disputes Tribunal was within the law. Orders of certiorari are issued to quash decisions by public officers or public officials that are either illegal or made outside their powers or made without due procedure or process being complied with. The complaint of the applicant is that the orders of the Land Disputes Tribunal were unlawful and directed to a non-existent title.

The jurisdiction of the Land Disputes Tribunals was governed by the Land Disputes Tribunal Act (Cap.303A), now repealed. Section 3 (1) of the Act provides as follows -

“3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to -

- a. ***division of, or the determination of boundaries in land, including land held in common;***
- b. ***a claim to occupy or work land;***
- c. ***trespass to land;***

shall be heard and determined by a tribunal established under Section 4.”

From the documents filed herein, the land in question was registered land. Title has been issued under the Registered Land Act (Cap 300). In its decision, the Land Disputes Tribunal stated as follows -

- “1. A new survey exercise be contacted (sic) on the original title of Butso/Esumeyia/779, this is because some titles have overlapped onto others. Resurveying will give the correct and true position of each land.***
- 2. That proper boundaries be put in place to put a stop on frequent disputes among occupants of these titles as regards trespass and encroachment.***
- 3. That the above survey be carried out by the District Land Registrar and the District Land Surveyor who are the legal experts in such matters as required by law.”***

Having considered the contents of the above decision of the Tribunal, I am of the view that they went beyond their powers as envisaged under Section 3(1) of the Act. Their jurisdiction would be limited to the determination of boundaries. They could not, nor did they have powers to deal with overlapping titles and order the carrying out of survey on land which had already been registered. The power to survey and settle disputes regarding boundaries on land registered under the Registered Land Act is vested in the Land Registrar. The Land Registrar has such powers vested in him under Section 22 of the Registered Land Act (Cap 300). The Land Disputes Tribunal had no authority to purport to exercise such powers. Therefore in my view, the decision by the Land Disputes Tribunal herein was made outside their powers. It was illegal, null and void. It is for quashing through certiorari.

As for costs, the interested party will bear the costs of these proceedings.

Consequently, I allow the application and grant the certiorari orders sought. The interested party will pay the ex-parte applicant the costs of these proceedings.

Dated at Kakamega this 31st day of October, 2013

George Dulu

JUDGE