



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION 45 OF 2010

REPUBLIC.....APPLICANT

V E R S U S

VIHIGA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT VIHIGA.....2ND RESPONDENT

A N D

SHEM SINZORE AJEGA.....INTERESTED PARTY

JAMEN KIZURI BULULU.....EX PARTE

R U L I N G

In his application dated 23rd November 2010 the applicant is seeking an order declaring an award made by the Vihiga Land Disputes Tribunal as ultra vires, illegal and unlawful as well as an order of prohibition prohibiting the Vihiga Senior Resident Magistrate from entertaining proceedings in Miscellaneous Civil Application Number 53 of 2007. The applicant was granted leave by the court on 5th November 2010.

Mr. Musiega, counsel for the applicant submitted that the applicant was not a party to the proceedings before the Land Disputes Tribunal and was not aware of those proceedings until 21st October 2010 when he was arrested in the process of execution of that decree. The applicant is the registered owner of plot number **NORTH MARAGOLI/VIYALO/796** from 1973 and the claim by the interested party having been filed in 2007 was time barred.

Counsel further submitted that although the Land Disputes Tribunal purported to be dealing with a boundary dispute, the issue at hand related to only one plot. Counsel contends that once leave of the court is issued, it cannot be challenged and the court can only deal with the merit of the case.

Mr. Chitwah, counsel for the interested party opposed the application. Counsel contends that orders of Judicial Review are not available to the applicant as Judicial Review deals with the process. The applicant did not appeal against the decision of the Land Disputes Tribunal. The applicant appeared before the Tribunal and gave a statement. He had a 30 day period to appeal but did not and therefore the orders of Judicial Review being sought are time barred. Counsel further submitted that the trial court did observe

that it had jurisdiction to entertain the matter as it was a boundary dispute. Leave to file application for Judicial Review as erroneously issued by the court. The orders of prohibition cannot be issued without quashing a decision that had been made. The interested party owns plot number **NORTH MARAGOLI/VIYALO/802**.

The proceedings before the Vihiga Land Disputes Tribunal in case no. 21 of 2007 was between Shem Sinzore Ajega (claimant) and Mark Bululu Kiziri (objector). The objector's name in the proceedings is given as Mark Kiziri Bululu while his name in the current proceedings is given as Jamen Kiziri Bululu. The proceedings show that Mark Kiziri Bululu participated in the dispute and claimed ownership of plot number **KAKAMEGA/VIYALO/796** and that the interested party herein was his neighbour. I do find that Mark Kiriri Bululu and Jamen Kiziri Bululu is the same person and his contention that he did not participate in the proceedings before the Land Disputes Tribunal borders on perjury. His wife, Jane Vihenda Kiziri testified before the Tribunal.

The applicant is seeking both declaration and prohibition orders. The applicant sought leave of the court before filing this application. That was necessary as the second prayer is for an order of prohibition. The decree of the lower court was issued on 10th July 2009 as per the annexed copy of the decree. The current application was filed on 23rd November 2010. Under **Order 53 Rule 2**, leave for an order of certiorari shall not be granted when the application is made six months after the order or decree was granted. Counsel for the respondent contends that the current application is time barred. The application does not seek an order of certiorari which requires the six months period. I do find that the current application is not time barred and can be entertained by the court.

The main issue for determination is whether the Vihiga Land Disputes Tribunal had the jurisdiction to entertain the claim by the interested party who filed his claim before the Tribunal contending that the applicant had taken part of his ancestral land. He wanted part of the applicant's home to be removed together with some trees as they formed part of his ancestral land. He urged the Tribunal to help him recover the upper part of his land as his plot runs from the upper part of the road to the lower part of the road to the river valley. On his part, the applicant opposed that claim stating that demarcation was done by his late father who registered the land in 1969. No complaint was made that time until 2001 when his father died.

The Tribunal's verdict is as follows:-

- 1. Shem has been awarded the upper part of his land annexed by Mark Bululu between his house and the road.*
- 2. The Land Registrar is ordered to fix the boundary running from down to the upper part of the road on the side of Mark and Shem*

The above verdict was adopted by the Vihiga Resident Magistrate on 29th October 2008 and a decree was issued on 10th July 2009.

The effect of the first finding by the Tribunal is that the applicant was to lose part of his land. Although the claim appeared to be a boundary dispute, the Tribunal did not proceed by having the boundary fixed by the Land Registrar first before making its findings. Indeed the proceedings do not show whether the Tribunal visited the land in dispute. By excising part of the applicant's land and giving it to the interested party, I do find that the Tribunal lacked jurisdiction to do so.

Section 21 of the Registered Land Act (Cap 300, Laws of Kenya) empowers the Land Registrar to determine boundary disputes. The applicant is the registered owner of plot number **NORTH MARAGOLI/VIYALO/796** while the interested party is the registered owner of plot number **NORTH MARAGOLI/VIYALO/802**. Both plots seem to be registered under the Registered Land Act. The second finding by the Vihiga Land Disputes Tribunal was to the effect that the Land Registrar fixes the boundary between the two plots. If indeed the interested party's claim is a boundary dispute then parties are at liberty to pursue the fixation of the boundary by the Land Registrar and such an exercise has no

time limit. However, if the essence of the interested party's claim is to annex part of the applicant's land, that claim falls outside the jurisdiction of the Land Disputes Tribunal as well as the Land Registrar. Since the Vihiga Land Dispute Tribunal annexed part of the applicant's land and gave it to the interested party without jurisdiction, such an illegality cannot be allowed to stand. The decision of the Vihiga Land Disputes Tribunal is hereby declared unlawful and all orders that resulted from the findings of the Vihiga Land Disputes Tribunal are unlawful too. The Vihiga Senior Resident Magistrate is hereby prohibited from entertaining any proceedings emanating from the decision of the Vihiga Land Disputes Tribunal in claim number 21 of 2007 between the parties herein. The application dated 23rd November 2010 is granted in the above terms. Each party to meet his own costs.

Delivered, dated and signed at Kakamega this 10th day of May 2012

SAID J. CHITEMBWE
J U D G E