



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**JUDICIAL REVIEW 26 OF 2009**  
**BRUNO PATRICK MURUNGA.....APPLICANT**  
**VERSUS**  
**THE CHAIRMAN, L.AND DISPUTES TRIBUNAL**  
**MUNICIPALITY DIVISION- KAKAMEGA.....RESPONDENT**  
**AND**  
**MARSELINA SHIALILA EKESA.....INTERESTED PARTY**

**R U L I N G**

In the application dated 20<sup>th</sup> July, 2009, the exparte applicant's seeking an order of certiorari and prohibition. The application is supported by the statement dated 10<sup>th</sup> July, 2009 and an affidavit of the applicant sworn on the 9<sup>th</sup> July, 2009. Parties herein agreed to file written submissions and left the rest to the court.

The proceedings herein show that the interested party also filed High court civil case number 268 of 2009 and the same is pending determination. Parties agreed to resolve the judicial Review application first.

The applicant contends that the dispute with the interested party was deliberated upon by the Kakamega Municipality Division Land Disputes Tribunal in 1998 and finalized. The dispute was also heard and determined but the Kakamega District Land Registrar. The interested party appealed to the Western province Appeals Committee and the decision of the Appeals committee was filed in court; vide Kakamega RMCC Miscellaneous application number 57 of 1999. The applicant further contends that in the year 2009 he was once against summoned before the Kakamega Municipality Land Disputes Tribunal and the matter was heard again. A second ruling was delivered on 23<sup>rd</sup> June, 2009 and the Tribunal ordered the applicant to be evicted from his land.

On her part, the interested party filed a replying affidavit and a further affidavit on 11<sup>th</sup> May and 28<sup>th</sup> May 2010 respectively. Although counsel for the applicant submitted that the further affidavits be ignored, I do find that there is no need to do so as the applicant has had ample time to respond to it. The interested party's position is that she is the registered proprietor of plot number BUTSOTSO/SHIKOTI/1832 measuring 0.19 Ha and that plot number BUTSOTSO/SHIKOTI/5048 does

not exist. The applicant had encroached on her plot and all the land on the ground is on plot number 1832 belonging to her. The respondent further contends that she filed a boundary dispute before the Tribunal and that was within the law and the verdict of the Tribunal was proper. It is the interested party's contention that plot number 5048 does not border plot 1832 and is not existing on the ground.

I have perused the written submissions by the counsels for both parties. The submissions by the applicant briefly explain the applicant's case as herein above stated. The submissions by the interested party is that the land dispute Tribunal had jurisdiction to determine the boundary dispute. If the boundary is restored, then the applicant will have to be evicted.

The proceedings herein establish that the dispute between the two parties had been deliberated upon in different forums. On 22<sup>nd</sup> July, 1997, the Kakamega land Registrar heard the matter and made his decision. Part of the registrar's findings read as follows:

***“The boundary between parcel No. Butso/Shikoti/1832 and 5048 owned by the 1<sup>st</sup> defendant (Bruno Patrick Murunga) is firm and clear on the ground and supported by fencing wire which has never been interfered with for a long time. The surveyor has taken measurements as per the mutation documents and confirmed the existing boundary to be at its original position.”***

The first verdict of the Municipality division, land Disputes Tribunal reads as follows:

### **VERDICT**

***The seller of the land (Otuko Sayi) states that Dadayo Ashira (deceased) bought the parcel No. BUTSOTSO/SHIKOTI/1832, when the parcel in the name of Bruno Murunga was there. There never had been any dispute between them Dadayo Ashira (deceased) sold the same land to Marsellah Sialila Ekesa (claimant) and this is the time the boundary dispute started. This was verified by land Registrar on 27/7/1997 and confirmed that the boundary was in order and intact. The land parcel No. BUTSOTSO/SHIKOTI/5048 belonging to Bruno Murunga exists and appears on the map page 18, contrary to statement from the complainant Marsellah Sialila Ekesa, we find that Murunga owing Parcel No. Butso/Shikoti/5048 genuinely and has no case to answer we enclose photocopies of matters for verification.***

The dispute was referred to the Provincial land Disputes Appeals Committee; vide case number 40 of 1999. The Appeals committee made the following orders:

***“Government Survey to visit and verify common boundary in dispute to either confirm correctness or to correct it if found to be wrong. Appellant to meet the cost. Appeal allowed. Verdict of Municipality land Disputes Tribunal is set aside”***

The appellant before the provincial Appeals Committee was the interested party. Following the decision of the Appeals Committee a surveyor from Kakamega visited the two plots and in his letter dated 3<sup>rd</sup> February, 2003 reported that “ *the borders were found to have the same measurements as the ones measured (scaled) on the map. The surveyor urged the owners of the respective plots to maintain the boundaries.*”

The Municipality Division re-heard the dispute (vide case number 3/2009 and its final verdict reads as follows:-

### **VERDICT**

Having heard and considered the representation of all the parties and their witnesses, and having considered all documents submitted to us, we hereby decide as follows:-

***i. That although the objector Bruno Murunga has stayed in the disputed plot for several years, he is not covered by the Limitation of actins Act for two reasons:-***

**(a) The method he must have used to curve part of Marcella's land to be his was fraudulent.**

**(b) The claimant Marcelina Ekesa launched a complaint with the local administration immediately she learnt that her land had been encroached on by the objector.**

**ii. In view of the aforementioned reasons, the claimant's prayer that the objector be evicted from disputed plot is awarded. The boundary between Butsotso/Shikoti/1832 to be reinstated in its original position as per Mutation Form appendix IV.**

**iii. Each party to bear its costs. Any aggrieved party by the decision of this tribunal is advised to appeal to the Provincial Land Disputes Appeal Committee within 30 days from the date of this verdict. The decision was read to the concerned parties on 23<sup>rd</sup> June, 2009.**

The second verdict of the Municipality Division land Disputes Tribunal was read on the 23<sup>rd</sup> of June, 2009. On the 19<sup>th</sup> March 2010, the interested party filed Kakamega HCCC No. 39 of 2010 against the applicant herein seeking the eviction of the applicant from plot number Butsotso/Shikoti/1832.

It is established from the pleadings herein that the applicant is the registered owner of plot number Butsotso/Shikoti/5048 measuring 0.06 Hectares. The interested party is the registered owner of plot number BUTSOTSO/SHIKOTI/1832 measuring 0.19 Hectares.

According to the verdict by the land Registrar, there is another person by the name ELSON ANJERE ETINDI who is occupying part of plot number 1832 having bought the portion of land from the person who sold to the interested party. However, the interested party had all the land registered in her name.

Going back to the application for orders of certiorari and prohibition, I do find that it was not only unprocedural but unlawful as well for the Municipality Division to have heard the dispute between the parties for the 2<sup>nd</sup> time. Indeed in its proceedings the Tribunal noted that the dispute had been heard by “**the local administration, the previous Tribunal, the provincial appeals and now back to the current tribunal**”. **Each time the claimant loses the battle, but continues with the struggle. Even Kakamega Survey has not been able to sort out the problems**”.

Now that the land Disputes Tribunal Act No. 18 of 1990 is repealed there will be nothing to prohibit. That prayer has been overtaken by events by the coming into force of the land and Environment court: with regard to the order of certiorari, I do find that Municipality Division Tribunal lacked jurisdiction to make an order for the eviction of the applicant from his property. The Tribunal held that “**the claimant's prayer that the objector be evicted from disputed plot is awarded**”.

As stated in the 2<sup>nd</sup> verdict by the Municipality Division Tribunal, the interested party will continue with the struggle. My advice to her is that the dispute would be effectively settled by the surveyor and the land Registrar. The courts will in most cases follow the professional advice of the surveyors. The interested party bought her land after the applicant had already developed his plot: The surveyor's advice is that the boundary does exist on the ground. The interested party needs to find out with the measurements given by the surveyor is equivalent to the acreage on her title and if that is the case be contended with what she has otherwise the battle she started has turned out to be a full blown war. What she thought was a simple race has turned out to be a marathon.

In the end, the application dated 20<sup>th</sup> July, 2009 is hereby granted but limited to the order of certiorari only. I do not wish to burden the interested party with costs. Each party shall meet his/her own costs.

**Dated at Kakamega this 27<sup>th</sup> day of June 2012.**

**SAID J. CHITEMBWE**

**JUDGE**