



REPUBLIC OF KENYA

High Court at Kakamega

Miscellaneous Civil Application 12 of 2009

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEWS UNDER ORDER LIII OF
THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND THE
REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

AND

**IN THE MATTER OF THE DECISION OF THE DISTRICT LAND REGISTRAR,
KAKAMEGA MADE ON 10TH DECEMBER, 2008 IN RESPECT OF LAND PARCEL NOs.
IDAKHO/SHISESO/1465 AND IDAKHO/SHISESO/1857**

B E T W E E N

1. TRUFENA MHENJE MUKHONO

2. VINCENT SUNGUTI MUKHONO.....EX-PARTE APPLICANTS

VERSUS

1. THE DISTRICT LAND REGISTRAR, KAKAMEGA

2. THE HON. ATTORNEY GENERAL.....RESPONDENTS

AND

BLASIO KUBAI INTERESTED PARTY

R U L I N G

The application by way of Notice of Motion dated 2.6.09 seeks the following orders:-

“1. That orders of certiorari do issue to remove into this Honourable court and quash the decision and orders of the District Land Registrar, Kakamega made on the 10th December 2008 ordering the reopening/re-creating of a 4 metre road of access for the Interested Party’s land parcel No. IDAKHO.SHISESO/1465 and IDAKHO/SHISESO/1857.

2. That an order of Prohibition do issue to stop and prohibit the 1st respondent or any other person acting pursuant to the decision of the Kakamega District Land Registrar made on 10/12/2008 from enforcing, executing or attempting to enforce and execute the said decision and or order with respect to land parcel Nos. IDAKHO/SHISESO/1465 and IDAKHO/SHISESO/1857.

3. That the costs of this application be provided for.”

The application is supported by the affidavit of the 1st applicant, TRUFENA MUHENJE MUKHONO sworn on 2.6.09.

According to the said affidavit, land parcel No. IDAKHO/SHISESO/1465 is registered in the names of ALFONCE MUKHONO, the late husband to the 1st applicant. Land parcel No. IDAKHO/SHISESO/1857 is registered in the name of the 2nd applicant. It is averred that the District Land Registrar Kakamega created a road access between Land Parcel No. ISUKHA/SHISESO/1465 and IDAKHO/SHISESO/1857 without notice to the 1st applicant and without reasonable notice to the 2nd applicant.

The applicants criticized the decision of the Land Registrar as being fundamentally defective stating that the proceedings before the District Land Registrar are neither signed nor dated, the venue for the sitting is not shown and that L.P. NO. IDAKHO/SHISESO/1465 was affected yet according to the heading of the proceedings the said parcel of land was not affected. It is further averred that the complainant, VINCENT SUNGUTI MUKHONO is not reflected as a party to the proceedings yet his land parcel No. IDAKHO/SHISESO/1857 was affected.

According to the applicants, if the decision of the District Land Registrar is implemented, it will create a road of access right through the middle of their compound thereby exposing them to security issues and also cause extensive damage to property.

The application is opposed to. The respondent filed grounds of opposition which term the application as defective and unsustainable in law.

The interested party, BLASIO KUBAI filed a replying affidavit sworn on 19.3.10. In the said affidavit, VINCENT MUKHONO (2nd applicant) is blamed for purporting to block the access road thereby denying the interested party access to his land parcel No. IDAKHO/SHISESO/1406.

According to the interested party, the 2nd applicant as the proprietor of L.P. NO. IDAKHO/SHISESO/1857 was summoned by the District Registrar to appear on the 10.12.2008 at 10.00 a.m. to have the dispute determined.

The applicants were represented by the firm of Shitsama & Co. advocates while the interested party was represented by the firm of Gichaba Ondieki & Co. advocates. The parties filed written submissions which I have duly considered. The respondents were represented by Leah Wandia K., a State Counsel. The respondent did not file any submissions.

The first issue raised on behalf of the applicants is that they were not given an opportunity to be heard.

Paragraph No. 9 of the affidavit in support of the application shows that the 2nd applicant was served on 9.10.08 with the summons dated 3.12.08 (annexture “TMM4”) which reflects the boundary dispute to be determined was between L.P. No. IDAKHO/SHISESO/1406, L.P. No. IDAKHO/SHISESO/1855 and IDAKHO/SHISESO/1857. The meeting was to take place at the site on 10.12.08 at 10.00 a.m. The summons also reflects that the boundary dispute would be determined in the absence of those who failed to attend. It was therefore up to the 2nd applicant to attend or communicate his position to the District Land Registrar. The 2nd applicant failed to do so at the risk of the dispute being determined in his absence.

Land parcel No. IDAKHO/SHISESO/1465 was not mentioned in the said summons. The certified copy of the proceedings (annexture “TMM6”) shows that IDAKHO/SHISESO/1465 belonged to the estate of the late ALFONCE MUKHONO where the 1st applicant is the administrator was not the subject of the complaint. Although the complaint was against the 2nd applicant who is said to have closed the disputed access road, the ruling made was against the 2nd applicant.

Although the 1st applicant was present during the proceedings, she had not been served with the summons and nor was she heard. The 1st applicant was not prejudiced as the boundary marks affected related to L.P. No. IDAKHO/SHISESO/1857.

The other issue raised by the applicants is whether the District Land Registrar had the requisite jurisdiction to make the orders dated 10.12.08 or whether he acted *ultra vires* under section 21 (2) of the Registered Land Act. The Registrar has powers to “**determine and indicate the position of the uncertain or disputed boundary.**” The District Land Registrar re-opened the road access by reinstating the boundaries of L.P. NO. IDAKHO/SHISESO/1857. The complaint before the registrar was stated before a boundary dispute. The creation of the boundaries surrounding the road access resulted in the opening of the road access. The Registrar therefore acted within his powers. One cannot talk of there being no dispute in respect of the boundary between IDAKHO/SHISESO/1406 and IDAKHO/SHISESO/1857 because the boundaries to the access road affect the other parcels of land nearby.

The failure to state the date and venue of the proceedings before the Registrar did not occasion any prejudice. The summons issued clearly stated the date and venue of the proceedings as 10.12.08 at 10.00 a.m. at the disputed boundary. The proceedings are duly signed.

With the foregoing, I find the application has no merit and dismiss the same with costs.

Delivered, dated and signed at Kakamega this 29th day of November, 2012

**B. THURANIRA JADEN
J U D G E**