



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. CIVIL APPLICATION NO.9 OF 2009 (JR)

**IN THE MATTER OF PETER LANGIRI, IBRAHIM WANCHI, PAUL OSOGO AND
RAPHAEL OTARO –**

FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF BULALANGI LAND DISPUTES TRIBUNAL

AND

**IN THE MATTER OF BUSIA PRINCIPAL MAGISTRATE'S COURT
LAND DISPUTES CASE NO.36 OF 2009**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**BUDALANGI LAND DISPUTES TRIBUNAL
BUSIA PRINCIPAL MAGISTRATE.....RESPONDENTS**

AND

CYRIL OTIS SARI
TASSYSIA SARI KUDIRA.....INTERESTED PARTIES
TIEDORA KATEGI SARI

EX PARTE

PETER LANGIRI
IBRAHIM WANCHA
PAUL M.B. OSOGO
RAPHAEL OTARO

J U D G E M E N T

The matter before the court is a Notice of Motion dated 21.7.2009, brought under Order 53 of the Civil Procedure Rules by the Ex parte Applicants. They seek the Judicial Order of Certiorari to quash the award or decision of the Budalangi Land Disputes Tribunal case No. Bunyala/Bukoma/418 as adopted by Busia Principal Magistrate's Court Land Dispute Case No.36 of 2009. The Ex Parte Applicant also sought the order of Prohibition to stop execution of the order.

The grounds upon which the application is based, as shown on its face are:-

That the Tribunal acted without or beyond its powers making Tribunal's award or decision ultra vires and accordingly, null and void.

The Interested Parties filed grounds of opposition which included the following:-

1. That the Tribunal acted within its powers and jurisdiction in accordance with the rules of natural justice.
2. That this application offends the provisions of Order 53 rule 1 and 2 of the Civil Procedure Rules.
3. That viva voce evidence should have been adduced before the Certiorari and Prohibition orders could be granted.
4. That the application is unmeritorious.

Further in support of the opposition to the application the Interested Party claimed long occupation of over 50 years on the relevant land which therefore, gave them rights by adverse possession. The Interested Parties also asserted that the Tribunal had jurisdiction to award them the right of occupation and working over the land. They also claimed that this application is fatally defective for being supported by defective affidavits and that the application obtaining leave was filed out of the time prescribed by law.

The Ex Parte applicants assert in their affidavit that the land in issue i.e L.R. No. Bunyala/Bukoma/418, was originally registered in the name of Patroba Langiri Osogo, (deceased) at the time when the Tribunal suit was filed. It was sold to Ibrahim Makulu Wancha the 2nd Ex Parte Applicant in 2008 at Kshs160,000/=. The title was accordingly transferred to Ibrahim. Apparently the Interested Parties who were then occupying part of it got aggrieved. They filed the Tribunal suit seeking the part they then occupied and which they claimed to have occupied for over 50 years and thereby acquired, inter alia, ownership by adverse possession.

The Tribunal's ruling was to the effect that:-

“.....it was established that the land in dispute belongs to Donati Sari's family (Interested Parties) and accordingly, the complainants are awarded the land. Therefore the defendants (Ex Parte Applicants) should either refund the buyer his money or allocate him another land elsewhere.”

When this came up for a hearing on 4.10.2010, the Counsel for the two sides agreed to file written submissions by the Ex Parte Applicants within 21 days of the order and by the Interested Parties within 21 days of service of the written submissions of the Ex Parte Applicants. The matter was then by consent fixed for mention on 4.11.2011 to take a Judgement date. On 4.11.2010 the Mr. Jumba for Ex Parte Applicant confirmed that he had filed his written submissions and took a judgement date. Mr. Fwaya for the Interested Party appeared to agree with Mr. Jumba that he had also filed his written submissions. I have keenly searched this file for Mr. Fwaya's written submissions, but I am certified that he did not file them in this file if he ever filed them at all. The court accordingly decided to proceed to judgement with the documents found in the court file record.

I have considered the reasons given for seeking to quash the Budalangi Land Disputes Tribunal. The decision or award of the Tribunal later awarded by Busia Principal Magistrates Court in its Land Disputes Case No.36 of 2009, clearly purported to decide that the suit land belongs to the family of the Interested Parties. That was so despite its being originally registered in the name of Patroba Langiri Osogo, the father of the 1st Ex Parte Applicant. It is not disputed that the land was sold and registered in the name of the 2nd Ex Parte applicant. The tribunal, in awarding the land to the Interested Parties, effectively made a finding that it should be given to them or transferred to them. In also ordering that the 2nd Ex Parte applicant should be refunded his purchase price, is understood by this court to mean, that the sale and transfer of the land to the 2nd applicant was cancelled by the tribunal and that all he was entitled to was refund of purchase money or another land allocation from the 1st Ex Parte applicant.

Put differently, the tribunal had by its order or award, transferred the beneficial substantive interest in the said land from the Ex Parte applicants to the Interested Parties. In my view and finding, the Tribunal lacked the jurisdiction to order expressly or impliedly the transfer of any substantive beneficial interest in the registered land afore stated. Such power is given to the High Court under Section 159 of the Registered Land Act, Cap 300 which also in some cases gives the same power to the Resident Magistrate's Court.

Jurisdiction of the Land Disputes Tribunals including appeals Land Disputes Tribunals, is limited to the power donated in section 3(1) of the Lands Disputes Act. Act No.3 of 1990. It provides –

“S.3. Subject to this Act, all cases of a Civil nature involving a dispute as for

a) The division of, or the determination of boundaries to land including land held in common;

b) A claim to occupy or work land or

c) Trespass to land, shall be heard and determined by a Tribunal established under Section 4.

I have before, elsewhere, commented that sub section (a) above, in so far as it purports to suggest that the Tribunal has power to deal with “division” of registered land, is misleading to the tribunals in the exercise of its functions relating to land. Indeed our courts have persistently stated that the Tribunals have no jurisdictions to deal in matters affecting substantive beneficial interests in respect to any registered land. The Tribunal has, on the other hand, power to determine boundaries formerly fixed by the court or during adjudication without interfering with the Land Registrar’s powers under Section 21-22 of the Registered Land Act, Cap 300.

In my view also, the Tribunals have power to decide on claims to occupy or continue occupying or working on the land, even one registered. The court accordingly envisage a case where the party in occupation could be authorized by the tribunal to stay on until the substantive rights of his claim are determined by the High Court. In the same manner the Tribunal can be said to have power to determine whether or not a party has trespassed onto the registered land or not, and if it establishes a trespass, it may order or give a vacation order while the parties are declared at liberty to file suits elsewhere to establish substantive or beneficial interests.

In conclusion of these general issues of the law establishing the Tribunals, it is my considered view that the promulgation thereof was not clearly thought out. Research of the statute’s effect upon other existing Legislation over land rights was not sufficiently carried. It is possible to suggest that the legislation was brought to our law books more probably due to political pressure than by legal necessity. As a result, the legislation’s application has resulted more to causing confusion among the local people than bringing legal relief to them. The elders appointed to constitute the courts have often misunderstood their power or duty, even where they acted with honesty and integrity. At the end of the day, the work of the Tribunals has more often been quashed or set aside by the High Court thus showing that the existence of the Tribunal as an institution rendering fairness and justice to the citizens, has truly failed.

On the other hand, the resource put into the institution, both in terms of personnel and finance, is majorly wasted. This court by various presiding judges, has loudly uttered their recommendations to have the aforesaid Act amended or repealed for the good of the parties who waste a lot of their time and finances in filing cases in the relevant tribunals, and for the good of the State which spends funds and human resource to maintain them. However, to date, those voices have not been heeded. It is my duty once more to add my voice to those others asking that relevant authorities, including the office of the Attorney-General, to consider the recommendations of the court over this legislation.

Turning now to this case before me, I hold that the decision of the Budalangi Land Dispute Tribunal was ultra vires its jurisdiction. It had no power to give the substantive beneficial interests in L.R. No. Bunyala/Bukoma/418 to the Interested Parties herein.

The said award or decision is by the order of Certiorari recalled to this court and quashed forthwith.

It is clarified however, that the Interested Parties' rights as occupants for a long period or any possible land trusts which may exist hereto can only be established through proper suits by a court having jurisdiction.

Costs of this suit are to the ex parte applicants. Orders accordingly. Dated and delivered at busia this 12th day of may 2011.

D.A. ONYANCHA

JUDGE.