



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. APPLICATION NO.72 OF 2004

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

REPUBLIC.....APPLICANT

=VERSUS=

DISTRICT LAND REGISTRAR- BUSIA

DISTRICT LAND SURVEYOR-BUSIA.....RESPONDENTS

AND

AMBROSE LUKE ACHUNGO.....INTERESTED PARTY

EX PARTE

MARIA BARASA KUDOI.....EX PARTE APPLICANT

J U D G E M E N T

The application before the court is the Notice of Motion dated 27.7.2004 seeking the Orders of Certiorari and Prohibition. The facts of the suit as the court understands them are as follows:-

The Interested Party filed a claim before the Butula Land Disputes Tribunal in Tribunal Case No.2 of 2001 against the Ex Parte Applicant concerning the position of the boundary between Parcel No.Marachi/Esikoma/871 which belongs to the ex parte applicant and parcel No. Marachi/Esikoma/872

belonging to the father of the Interested Party. The Tribunal and its Appellate counterpart appear to have found that a boundary fixed in 1939 between the parcels should be retraced and fixed by the District Land Registrar and his surveyor.

The Land Registrar appears to have visited the two parcels of land on 30.9.2003 and fixed the boundary. He found that in doing so, he had to take a portion of 0.37 hectares from the Ex Parte applicant's portion and give it to the Interested Party. An independent private surveyor who re-surveyed the said portion transferred to the Interested Party, found that the same measured 3.5 acres. He confronted this fact upon the Busia District Land Registrar in a letter dated 10.12.2003 but the latter appears not to have responded.

The Ex Parte applicant bases her complaint on two main issues:-

- a) That the Registrar did not give her notice to be present during the alleged fixation of the boundary thus denying her a right to be heard and to put her representations on record about the proper position of the boundary.
- b) That the person who filed the suit before the Tribunal was not the registered owner of land parcel No. Marachi/Esikoma/872 and therefore had no locus standi.

The suit was fixed for hearing on 22.9.2010 when the parties agreed to proceed by way of written submissions. By 30.11.2010 the Ex Parte Applicant had filed her written submissions and the Interested Party was given 30 days to respond. On 9.2.2011 the advocate for the Interested Party confirmed to court that he had filed responding written submissions. Judgement was then fixed for 9.5.2011.

However, a careful search of this file does not show that the Interested Party actually filed his submission because no such written submissions are found in the file. Since this is a very old matter, I found no reasonable ground to postpone the Judgement on the ground that litigation has to come to an end.

I have carefully perused the file and the written submissions of the Ex Parte Applicant. I have also carefully perused the Replying affidavit of Ambrose Luke Achungo, the Interested Party who from the record, is the husband of the registered owner of L.R. No. Marachi/Esikoma/872.

Taking into account the contents in the said replying affidavit, I take the Interested Party's defence to be as follows:-

- a) That although the land was registered in his wife's name he had an interest in it as a husband, hence the reason for filing the Tribunal suit in his name instead of that of his wife.
- b) That the Provincial Land Disputes Appeals Tribunal read its award on 17.7.2003 in Appeals Case No.11 of 2001.
- c) That the information in the letter by District Land Registrar-Busia dated 14.1.2004 was not a decision which would attract a Judicial Review order since it was merely a confirmation of the Tribunal order of 7.1.2003.

The applicant's case as I stated hereinabove is that the Busia Land Registrar's coming to the land to fix, and fixing a boundary on 30.9.2003, was against the rule of natural justice because she was not served with hearing or attendance notice. Further, that they did not give her a chance to speak to point out the position of the boundary despite her request to do so.

The Interested Party however, did not dispute that fact i.e that the ex parte applicant was not served with notice and was not given a chance to state where the boundary was. While clearly, her views or evidence might not make any difference where the Land Registrar is to ascertain and determine a land boundary under Section 21 of the Registered Land Act under which both parcels spoken of herein are registered, it cannot be so said about a 1939 boundary fixed most probably in the absence of both parties as they may not have been born.

That is to say, it was important that the Land Registrar should properly serve notice to both parties to give each an opportunity to prepare. In addition, on the day of the actual tracing of the boundary, it was imperative that each party should be given opportunity to point out the important traces or land-marks of the boundary as relied on or pointed out by the Appeal Tribunal. Indeed, it cannot be denied, looking at the facts as they are, that even the Land Registrar was not in a position, on his own, to know the exact position of the 1939 boundary, without being guided by the parties or older persons who may have kept the knowledge thereof. In respect of that point, the Ex Parte Applicant stated that the District Land Registrar, while denying her opportunity to participate effectively, allowed the Interested Party alone to direct the exercise. This fact was again, not denied by the Interested Party anywhere in the record. In the circumstances, the court believed the Ex Parte Applicant on the point.

Careful examination of the documents making this application show also, that the Ex Parte Applicant is trying to re-open issues decided by the two Land Disputes Tribunals. In that respect it might be correct to say that the interested Party who was the claimant in both the Land Disputes Tribunal and Appeals Tribunal, had indeed no Locus Standi in the piece of land known as Marachi/Esikoma/872 since he was not the legal registered owner. It is not even clear why he would sue in his own name without joining his wife who was the registered owner and who was alive and present. However, these were issues that should have been taken up during the proceedings and during the appeal. The ex Parte applicant did not even appeal to this court from the Land Dispute Appeals Tribunal.

In the above circumstances those issues cannot be available to her in a Judicial Review suit limited only to the manner the District Land Registrar conducted himself.

In the above circumstances I hold that the Busia District Land Registrar acted against the rules of natural Justice. The order of Certiorari shall issue, quashing the result of his exercise and setting aside the boundary fixed by him between the parcels Marachi/Esikoma/871 and 872 as contained in his letter dated 14.1.2004. The effect of this decision is to order the Busia District Land Registrar to proceed to the pieces of land and in their presence and participation, refix the boundary of 1939.

The application is allowed with costs to the Ex Parte Applicant.

Dated and Delivered at Busia this 9th day of may 2011.

D.A. ONYANCHA

JUDGE.

