



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. APPLICATION NO.17 OF 2009

REPUBLIC.....APPLICANT

=VERSUS=

THE FUNYULA LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

**VERONICA JUMA SHILLINGI.....INTERESTED PARTY
EX PARTE.....JANE AWINO NALUKADA**

J U D G E M E N T

The matter before the court is the Notice of Motion dated 27.10.2009 filed in court the same day. It seeks an order of Certiorari to bring to this court and quash, the proceedings and award of Funyula Land Disputes Tribunal in Tribunal Case No.2 of 2009 relating to a parcel of land known as L.R. No. Samia/Luchululo/Bukhulungu/93. The award is said to have been adopted as a judgement of the Busia Principal Magistrate's Court Land Disputes Case No.22 of 2009 on 15.4.2009.

The Applicants written submissions raise the following grounds:-

- a) That there was no valid claim before the Lands Disputes Tribunal In view of the fact that the case was not filed in writing.

b) That the applicant being not the personal representative of the owner of the said land who was at the material deceased, could not successfully be sued on behalf of the deceased.

c) That the Tribunal lacked jurisdiction to entertain the case before it if any case indeed was before it. The two parties in this suit argued the case by written submissions after the court allowed them to do so.

The first ground argued by the Ex Parte Applicant, is that there was no valid claim before the Tribunal because the Interested party had not instituted the claim in writing.

I have carefully considered this ground. Section 3(2) of the Land Dispute's Tribunal Act, is very clear on how a dispute before the Tribunal should be commenced. It requires every dispute to be instituted by presenting a claim that contains a summary of the material facts of claim. I do not see how that can be achieved unless it is in writing. The claim or dispute intended to be lodged, has to be entered into the register of claims and a record probably through a file, requires to be opened into which other relevant Documents, such as a defence, will be entertained and served from. Furthermore a perusal of the provisions relating to commencement of a dispute, requires that the Registry shall charge a filing fees. In my view and finding, all the above procedures cannot be achieved unless the claim is lodged in a written form.

Even later on at the time of hearing the dispute, some recording has to be done. Where will the records be recorded? How will the other relevant parties be served or what will they be served with unless the claim is in writing? What will they respond to, for example concerning a defence unless the claim is in writing?

In my considered view and finding, unless the dispute is commenced in writing, there will no claim or dispute brought before the Tribunal. The omission in my view is not a mere irregularity but goes to the root of the claim. It makes the claim, if a claim it shall be called, non-existent, invalid and fatally incompetent. Since in this case the so called claim or dispute, was not lodged in writing, the same is ruled to have been no dispute recognizable in law applicable to such disputes. Put differently, there was no claim or dispute before the Tribunal that the Tribunal had capacity to entertain to arrive at a valid decision. The decision accordingly arrived by the Tribunal was invalid and incompetent as was the non-written claim. This finding should dispose of this matter. However, the court would wish to consider other grounds raised by the Applicant.

The second issue raised by the Ex Parte Applicant was that the claim was invalid so far as it was filed against the Ex Parte Applicant who was the wife of the registered owner of the title in dispute.

It was not denied that *Ex Parte* Applicant Jane Awino Nalukada, was the wife of Robert Odinga Nalukada who died on 22.3.2007. He died after he had been given a grant of letters of administration to the estate of Paul Nalukada Odukhula, who was his father and in whose name the relevant land title was registered. By the time the land dispute was purportedly filed before the Funyula Land Disputes Tribunal, Robert Odinga Nalukada, had, in the interim, been issued with a grant but the grant still required a confirmation by the court under the Law of Succession Act. The record does not show that the grant of letters was at any time during this dispute before the Tribunal, confirmed. And so the Ex Parte applicant argued, that she had no capacity to be sued by the Interested Party until the grant could be confirmed.

I have carefully considered the argument. I am of the view and I so find, that in so far as there was no actual evidence before the Tribunal that the Ex Parte Applicant had no confirmed grant of letters of administration to authorize her legally to represent her husband's estate, then it should have ruled that she had no capacity to be sued on behalf of the estate. The Tribunal accordingly erred in law in entertaining the claim against the Ex Parte Applicant who had no capacity to be sued. Any findings by the Tribunal made against her i.e the award herein, are accordingly void as the proceedings before the Tribunal were also void. More so because the Ex Parte Applicant was specifically sued **“as the personal representative of the deceased,”** where **“the deceased”** was meant to be Paul Nalukada Odukhula whose estate's grant of letters of administration had been given to Robert Odinga Nalukada who also was deceased.

The third issue I wish to consider was the Tribunal's jurisdiction to decide the dispute, assuming that the claim, was technically properly before it.

The information before and evidence recorded by the Tribunal shows that the Tribunal became aware that the land title in dispute pended in the High Court at Busia in Busia High Court Succession Cause No.58 of 2006. It became aware further as the record confirms, that a preliminary Grant of letter's of Administration had been issued but not confirmed. In those circumstances, in my view and finding, the Tribunal had no jurisdiction to entertain the same land title which also clearly formed the estate of the deceased before the High Court, a subject of claim before itself. In case the Interested Party was in any way aggrieved, she could file an objection in the succession proceedings where, indeed she stood a better chance to canvass all her claims. She could before the High Court, raise rights not only under adverse possession but also under land law rights, as well as contract law rights, without constraint of jurisdiction issues. However, she chose to risk her claims before a tribunal which in the circumstances had no jurisdiction.

Even considering the decision it made, the Tribunal ventured into dividing the land under dispute into two and ordering the Ex Parte Applicant to co-operate in giving part of the estate to the Interested Party. In doing so, in my view and finding, the tribunal gave itself jurisdiction to deal in substantial beneficial interest on land. Such interest, as I understand it, is beyond the actual jurisdiction given to it under Section 3 of the Land Disputes Tribunal Act aforesated.

In the above circumstances this court finds not only was there no dispute or claim before the tribunal as anticipated under the relevant legislation, but had no jurisdiction to make the award it made. As stated in the case of Kenya National Examination Council and Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others Court of Appeal Civil Appeal No 266 of 1996 at page 408:-

“...Only an order of Certiorari can quash a decision already made and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.....”

In this case accordingly this appeal is hereby allowed. An Order of Certiorari shall forthwith issue to quash and shall immediately quash the award, of the Funyula land Disputes Tribunal in Funyula Land Disputes Tribunal Case No.2 of 2009 as adopted by the Busia Principal Magistrate's Court Land Disputes Case No 22 of 2009. Orders accordingly.

Dated and delivered at Busia this 14th day of June 2011.

D.A. ONYANCHA

JUDGE.

