



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO.36 OF 2009

**IN THE MATTER OF AN APPLICATION BY SEVERINUS MBAYAKI APPLY FOR AN
ORDER OF**

**JUDICIAL REVIEW PURSUANT TO THE LAW REFORM ACT AND THE CIVIL
PROCEDURE ACT**

AND

**IN THE MATTER OF THE AWARD OF THE NAVAKHOLO LAND DISPUTES TRIBUNAL
CASE NO.2 OF 2007,**

**DECISION DATED 26.3.2009, CONCERNING LAND PARCEL L.R. NO.
BUNYALA/SIDIKHO/1634**

AND

**IN THE MATTER OF ADOPTION AND ENFORCEMENT PROCEEDINGS IN KAKAMEGA
CHIEF MAGISTRATE'S COURT**

MISC. AWARD NO. 53 OF 2009

AND

IN THE MATTER OF

REPUBLIC.....APPLICANT

V E R S U S

**THE CHAIRMAN NAVAKHOLO LAND DISPUTE
TRIBUNAL.....RESPONDENT**

AND

PIUS WAWIRE SIMIYU.....INTERESTED
PARTY

AND

SEVERINUS MBAYAKI SISAEXPARTE
APPLICANT

RULING

1. The Notice of Motion dated 12.10.2009 seeks orders of certiorari and prohibition to remove into this court and quash the decision of the Navakholo Land Disputes Tribunal in its case No. 2 of 2007 and to prohibit its enforcement by the Kakamega Chief Magistrate's Court.

2. The grounds in support are that;

(i) The Tribunal lacked jurisdiction to entertain and adjudicate over a claim for specific performance, occupation and ownership of land.

(ii) The Tribunal acted ultra vires in ordering the interested party to "reoccupy Land Parcel No. BUNYALA/SIDIKHO/1634."

(iii) The composition and number of the Tribunal members was illegal, it kept changing at every hearing.....

(iv) The Exparte Applicant SEVERINUS MBAYAKI SISA was not served (and) the proceedings breached the principles of natural justice.

(v) The Interested Party's claim was statutory time barred

(vi) The Tribunal proceedings and decision is a nullity ab initio.....

3. From the Applicant's Affidavit sworn on 17.8.2009 and the Replying Affidavit of the Interested Party sworn on 6.1.2010, it is not contested that the Applicant and the Interested Party executed a Sale Agreement in respect of 10 acres to be excised out of land parcel no. **Bunyala/Sidikho/168**. The parcel of land excised was later registered as land parcel no. **Bunyala/Sidikho/1634** and a title deed was issued to the Applicant on 3.10.2000.

4. According to the Applicant, all the legal processes leading to issuance of title documents were followed and he was surprised when the Interested Party instituted HCCC 19/2004 (Kakamega) seeking orders that because title no.1634 aforesaid was allegedly obtained fraudulently, the said title should be cancelled. According to him, the suit is still pending in this court.

5. Further, that he had no notice of the proceedings before the Tribunal and in any event, the decision made by it was a nullity.

6. The argument by the Interested Party was that the Applicant had agreed to pay to him KShs.500,000/= as consideration for the land aforesaid but ended up paying only KShs.140,000/= and has never paid the balance of KShs.360,000/=. He denied signing any transfer documents or attending the relevant Land Control Board for consent to transfer the land to the Applicant and so he pursued his claim through the Tribunal. He added that the Tribunal had jurisdiction to entertain the dispute and that the Applicant deliberately refused to appear before it although he had notice of the claim lodged against him. That the Motion is therefore misguided and should be dismissed with costs to the Interested Party.

7. I have perused the proceedings before the Navakholo Land Disputes Tribunal and one thing is clear; the Applicant never participated when the claim was set down for hearing on 26.4.2007 and also when the Tribunal visited the disputed land on 26.6.2007. Nothing has been stated on the record about that absence and therefore the Applicant's contention that he was not informed of the proceedings is lent credence.

8. The Tribunal, by proceeding ex-parte and without notice to the Applicant, acted in breach of **Section 3 (4) and (7)** of the Land Disputes Act No. 18 of 1990 which provide as follows;

"S.3 (1)

(2)

(3)

(4) Every claim shall be served on the other party, where there are more than one, on each of the

other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply.

(5)

(6)

(7) *The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party's witness or witnesses."*

9. It is also trite that when an adjudicating authority refuses to grant a party the fundamental right to be heard, then its decision, whatever the merits, will be rendered a nullity. That is why, in Pashito Holdings & Another vs Ndung'u & 2 Others KLLR (E & L) 1 295 at page 296 it was held as follows;

"The rule of audi alteram partem, which literally means "hear the other side", is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him."

10. I am duly guided and the holding squarely applies to this case.

11. Secondly, **Section 3 (1)** of the Act provides as follows;

"S. 3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) the division of, or the determination of boundaries 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."

12. In its decision, the Tribunal ordered that the Interested Party should be allowed to reoccupy the land but in fact the decision was one whose effect was to dispossess the registered owner of the land. **Section 159** of the Registered Land Act, Cap 300 provides as follows;

"S.159 – Civil suits and proceedings relating to the title to or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, in accordance with the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act."

13. The effect of the above section if read with **Section 3 (1)** above is that the Tribunal cannot delve into matters relating to title and/or ownership to land unless within the parameters of **Section 3 (1)** aforesaid. If it does so, then its decision would be rendered a nullity.

14. Thirdly the parties herein entered into the Sale Agreement on 12.5.1999. The claim before the Tribunal was instituted in 2007, a period of 8 or so years. **Section 7** of the Limitation of Actions cannot be invoked by the Applicant, neither can he benefit from the provisions of **Section 13 (3)** of the Land Disputes Tribunal Act.

15. The last issue I should address is the fact that from the proceedings of the Tribunal, on 26.4.2007, it had the following members;

"1. Joseph W. Tekeyi

2. Tom B. Wanyama

3. Nelson Makheti

4. Sifirino Barasa"

16. When it visited the disputed land, it had the following members;

"1. Wechuli J. Tekeyi

2. Nelson Makheti

3. Tom B. Wanyama"

17. When it sat again on 29.1.2009 for further hearing, it had the following members;

"1. Kennedy Kaula

2. John Bitonye

3. Johnson Rakama

4. Obadia Wangia

5. Tom B. Wanyama

6. Wechuli J. Tekeyi"

18. When it delivered its decision on 26.3.2009, it had the following members;

- “1. Wechuli J. Tekeyi
2. Tom B. Wanyama
3. Obadia Wangia
4. Kennedy Kaula”

19. I need not belabour the point, but gross injustice is committed when the arbiters in a dispute are replaced or changed during proceedings and no explanation is given nor the parties allowed to challenge the legality or otherwise of the changes or replacement.

20. In any event, the members sitting as a Tribunal shall be the number defined and provided for by **Section 4 (2)** of the Act which provides as follows;

“S.4 (1)

(2) *Each Tribunal shall consist of-*

(a) *a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and*

(b) *either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5.”*

21. The membership must always be an odd number because **Section 6 (2) (b)** provides that the decision of the Tribunal shall be that of the majority appointed under **Section 4 (2)** above. In the instant case, the numbers and membership were completely against the Act.

22. From what I have said above, it is obvious that the decision of the Tribunal was a nullity and must be called forth and quashed.

23. Before I allow the Notice of Motion however, I have seen the Plaint in HCCC 19/2004 (Kakamega) and the issues in contest are the same as in issue before the Tribunal. Whereas the Tribunal should not have delved into those issues, the parties are advised to revive that suit and let this court determine the entire dispute on the merits.

24. In any event, prayers (a) and (b) of the Motion dated 12.10.2009 are granted. Let each party bear its costs because none is to blame for the errors pointed out elsewhere above.

25. Orders accordingly.

Delivered, dated and signed at Kakamega this 29th day of September, 2010

ISAAC LENAOLA
J U D G E