



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION 3 OF 2008

**IN THE MATTER OF AN APPLICATION BY CHAIRMAN BOARD OF GOVERNORS
SHIKOTI GIRLS SECONDARY SCHOOL FOR LEAVE TO APPLY FOR AN ORDER OF
JUDICIAL REVIEW PURSUANT TO THE LAW REFORM ACT AND THE CIVIL
PROCEDURE ACT & THE RULES**

AND

**IN THE MATTER OF THE AWARD OF THE LURAMBI DIVISION LAND DISPUTES
TRIBUNAL CASE NO. 88 OF 2007 DECISION DATED 9.11.2007 AND DELIVERED ON
4.1.2008 CONCERNING LAND PARCEL REGISTRATION NO.
BUTSOTSO/INDANGALASIA/4**

AND

**IN THE MATTER OF ADOPTION AND ENFORCEMENT PROCEEDINGS IN KAKAMEGA
C.M. COURT MISC. AWARD NO. 226 OF 2007**

AND

IN THE MATTER OF REPUBLIC ----- APPLICANT

VERSUS

THE CHAIRMAN LURAMBI DIVISION

LAND DISPUTES TRIBUNAL ----- RESPONDENT

AND

ERNEST TSIMBWERE ----- INTERESTED PARTY

AND

THE CHAIRMAN B.O.G.

RULING

The Ex-parte Applicant filed this application seeking an order of Certiorari to issue to remove into this court and quash The Lurambi Division Land Dispute Tribunal proceedings and decision dated 9th November, 2007 and delivered on 4.1.2008 in case No. 88 of 2007 relating to L.R. NO. BUTSOTSO/INDANGALASIA/4 and an order of Prohibition against the same Tribunal or the Kakamega Chief Magistrate's Court in Award No. 226 of 2007 prohibiting it from enforcing the decision of the Tribunal.

Mr. Fwaya, Counsel for the Ex-parte applicant, submitted that the Interested Party's claim before the Tribunal was for land and thus the Tribunal lacked jurisdiction to entertain that claim, and that the interested party's claim was time barred as the cause of action arose sometimes in 1985 or 1989. Counsel for the Ex-parte Applicant further submitted that the person sued before the Tribunal was the Principal of Shikoti Girls Sec. School and this was irregular as under the Education Act, only the Chairman of Board of Governors can be sued. The Interested party lacked the capacity to file the claim as it was grounded on the rights of his deceased's father. Counsel further submitted that the composition of the Tribunal was improper. Section 4 (2) (b) of the Land Disputes Tribunal Act was contraversed as 12 members were involved instead of 2 or 4 plus the Chairman.

Miss Andia, Counsel for the Interested Party, opposed the application. Counsel submitted that the Tribunal had the jurisdiction to hear the matter as the same was based on Trespass which is provided for under Section 3 of the Land Disputes Tribunal Act. The claim arose in 2007 when the act of trespass occurred and hence was not time barred. Only five members of the Tribunal signed the proceedings. The Interested party also annexed copies of Sale Agreement indicating that only one acre was sold to the Ex-parte applicant instead of three. Counsel submitted that the issues raised by the Ex-parte applicant ought to have been dealt with in an Appeal and not by way of Judicial Review.

Section 3 of the Land Disputes Tribunals Act (Act No. 18 of 1990) limit the jurisdiction of land Disputes Tribunals to the following:-

- i. Division or determination of boundaries to land;
- ii. Claims to occupy or work land;
- iii. Trespass to land.

The dispute before the Lurambi Division Disputes Tribunal related to plot **BUTSOTSO/INDANGALASIA/4** measuring 7 Acres. The claimant was Ernest Tsimbwere whose case was that the Ex-parte applicant bought one acre from his late father but the school had fenced off three acres instead. He wanted the Tribunal to assist him get back his land which had been taken by the school.

The Ex-parte applicant's defence was that it bought three acres instead of one and that it fenced off the portion which it had bought. That initially the School had bought one acre but later on added two more acres.

The panel of elders decision was that the school be given one and a half acres and the claimant 5½ acres. That award was filed before the Kakamega Chief Magistrate's Court for adoption and the specific prayers are that the Interested Party herein was to be awarded 5½ acres.

The main issue for determination is whether the process by the Lurambi Division Land Disputes Tribunal was within the Tribunal's mandate as provided for in Section 3 of the Land Disputes Tribunals Act. Was that process involving division of land, or determination of boundaries? Was it a claim to occupy land or work on the land or was it a claim of trespass.

It is clear from the proceedings that the dispute involved a sale transaction. The claimant's evidence being that the defendant had bought one acre but had fenced off three acres. On the other hand, the defendant claimed to have bought three acres and that was the portion it had fenced. Evidence was given on how parties went to the Land Control Board for consent and surveyors visited the land. Sale Agreements were produced. The end result was to have the land sub-divided into two portions.

The above facts do not fit in the Tribunal's jurisdiction involving a claim to occupy or work on land. It was not a boundary dispute as each party's portion had to be determined. Further still, the dispute cannot be held to have involved the division of the land. This was a claim based on contract and not a simple reference to the Tribunal to have the land divided. Consent for the Interested Party submitted that the claim was based on trespass. An act of trespass involves entering someone's land or property without the owner's consent with the trespasser knowing that the land or property does not belong to him. In the proceedings before the Tribunal, part of the claimant's testimony was that the defendant had trespassed into his 2.5 Acres and on 29/6/2007 the defendant fenced off the land. On the other hand, the defendant did not believe that it was trespassing on the claimant's land and that it was entitled to the land it occupied. Since the land had not been sub-divided and each party's portion clearly demarcated and known, it will be futile to state that the dispute involved a case of trespass. Cases of trespass involve situations where the trespasser has no legal claim to the land and intentionally encroaches on a property already owned. In this case the defendant's defence was that the school was not a trespasser but the owner.

It is therefore my finding that the dispute fell outside the jurisdiction of the Land Disputes Tribunal and it ought not to have been dealt with by the Tribunal. The Tribunal ended up interpreting Sale Agreements and apportioning the land. The Interested Party herein has a valid claim but the same ought to have been directed to the court instead of the Tribunal.

I do not find any need to deal with the other issues raised by the parties herein. I do therefore bring up to this court the decision of the Lurambi Land Disputes Tribunal in case No. 88 of 2007 and quash the same forthwith and do further issue an order of prohibition against the Chief Magistrate Court at Kakamega from enforcing or deliberating on land Award Case No. 226 of 2007. Each party shall meet its own costs.

Delivered, dated and signed at Kakamega this 23rd day of July, 2009.

SAID J. CHITEMBWE

J U D G E