REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Misc Civil Appli 103 of 2006

CLEOPHAS WAMUKOYA KHAMALA ………..……… APPLICANT

V E R S U S

KANDUYI LAND DISPUTES TRIBUNAL ………... RESPONDENT

A N D

MAKHANU NGUREDE MUKAKULA ….…. INTERESTED PARTY

R U L I N G

The applicant seeks the following two Judicial Review remedies;

1. THAT JUDICIAL REVIEW and in particular, orders of CERTIORARI and PROHIBITION do issue against the decision of the Kanduyi Land Disputes Tribunal dated 3/7/2006 in respect of Land Parcel Number E. BUKUSU/N.SANG'ALO/1212 which decision has been adopted vide Bungoma Senior Principal Magistrate's Court Land Disputes Tribunal No.24/2006.

2. THAT the said decision of Kanduyi Land Disputes Tribunal dated 3/7/2006 in Tribunal Case No.6/2006 be removed into this court and the same be quashed.

3. THAT the Interested Party be ordered to pay costs of and occasioned by this applicant and

those the application for leave in Kakamega High Court Miscellaneous Application Number

103/2006."

The applicant submitted that this court ought to quash the tribunal's decision dated 3rd July 2006, and ought also to issue an order of prohibition against the Bungoma Chief Magistrate's Court, so that that court cannot execute the judgement.

The reason for wanting to have the tribunal's decision quashed was that the Tribunal had acted in excess of its jurisdiction when it ordered that the interested party be given some 1.5 acres of land. The said piece of land was supposed to be curved out from a bigger parcel of land.

When arriving at that decision, the Tribunal is said to have adjudicated on an issue of land ownership arising from a contract for the sale of 1.5 acres.

As far as the Tribunal was concerned, the applicant herein was required to surrender the land back to JAMES KHAMALA WAMUKOYA, who should thereafter curve out the 1.5 acres to be given to the interested party. Apparently, the Tribunal was persuaded that JAMES KHAMALA WAMUKOYA had signed a sale agreement with the interested party in 1975. But the said JAMES KHAMALA WAMUKOYA (hereinafter cited as "JAMES") did not undertake the necessary action to transfer the 1.5 acres to the interested party herein.

The applicant submits that because he was not a party to the agreement between James and the interested party, he cannot be forced to apply for consent from the Land Control Board, to transfer the 1.5 acres to either James or to the interested party.

Furthermore, as James never sought nor obtained the consent of the Land Control Board within 6 months of the date when he and the interested party signed the agreement in 1975, the applicant submits that the agreement was void. That submission is founded upon the provisions of *section 6* of the Land Control Act.

There is no doubt that pursuant that statutory provision, if the transaction is in relation to agricultural land, the Land Control Board of the area within which the land is located ought to give its consent to the said transaction within 6 months from the date when the agreement was executed.

But then again, the applicant herein was not party to that agreement. Therefore, the agreement, even if it were valid, cannot be enforced against him. Yet, because the applicant was not a party to the sale agreement, he too cannot seek to invalidate it.

When responding to the application the interested party submitted that there was no valid award which could be quashed by certiorari. It is his understanding that after the award was adopted as a judgement of the court, it became a judgement of the court, without any separate existence.

The interested party submitted that the order of prohibition cannot issue because the Tribunal became functus officio when it sent its award to the court, for adoption. And, as the court did adopt the award as its judgement, the interested party says that prohibition cannot issue because the magistrate's court was not enjoined to this application.

As far as the interested party is concerned, if the order of prohibition were to be issued against the court which adopted the award, then pursuant to Order 53 rule 3 (2) of the Civil Procedure Rules, the presiding officer of the court should have been served. That rule provides as follows;

"The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings."

The applicant did not respond to that submission. And I did not find anything on record to show that the presiding officer of the Bungoma Senior Principal Magistrate's Court was served with the Notice of Motion herein. Accordingly, to the extent that the applicant may have wished to have an order issued in respect to the court, he did not comply with the requirement of service upon the court. Therefore, I cannot issue an order of prohibition against the magistrate's court at Bungoma.

That would imply that even if the tribunal's award were to be quashed, there would be nothing to stop the magistrate's court from executing the judgement. In effect, an order of certiorari, quashing the decision of the tribunal would be in vain.

Secondly, although the Land Control Board did not give its consent to the sale agreement within the prescribed period or at all, that is an issue which goes to the merits of the case. Therefore, it is not the kind of issue that ought to be adjudicated upon in judicial review proceedings.

In CHALLY AKULA SWAKA Vs. MUMIAS LAND DISPUTES TRIBUNAL & ANOTHER, KAKAMEGA HIGH COURT MISC. APPLICATION NO.52 OF 2002, G. B. M. KARIUKI J. said;

"It cannot be correctly argued that the judgement of the Resident Magistrate entered pursuant to section 7 (2) and Rule 20 of the Land Disputes Tribunals (Forms and Procedure) Rules 1993, would be open to judicial review. I do not understand either of the parties to say that the power to enter that judgement was exceeded."

I am fully in agreement with that view. Consequently, even if the magistrate's court at Bungoma had been served with the application herein, there would have been no legal basis for quashing the judgement entered by that court.

In NASHON OCHIENG MBAYI Vs. THE HON. ATTORNEY GENERAL FOR AND ON BEHALF OF KHWISERO DIVISIONAL LAND DISPUTES TRIBUNAL & ANOTHERE, KAKAMEGA HIGH COURT MISC. APPLICATION NO.138 OF 2006, I expressed myself thus;

"*To my mind, if any decision making body lacks jurisdiction, any action it undertakes or decisions it makes are a nullity.*

Therefore, I cannot see how a judgement entered in accordance with an award which was made by a Tribunal that lacked jurisdiction, can stand.

However, until that judgement is formally vacated by a lawful order, it remains on record, for what its worth."

I remain of that same persuasion. Therefore, the next question is how the judgement can be lawfully challenged. That question was not raised before me, and must therefore await another day.

The applicant has raised pertinent questions which ought to be answered. However, because he has come by way of judicial review, the court declines to delve into the substance as that is not a function of judicial review proceedings.

The notice of motion is found to be incompetent. It is thus struck out with costs to the interested party.

Dated, Signed and Delivered at Kakamega this 27th day of November 2008.

FRED A OCHIENG

JUDGE