



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Misc Appli 44 of 2005

IN THE MATTER OF LANDS DISPUTE TRIBUNAL ACT LAWS OF KENYA

N THE MATTER OF BORABU LANDS DISPUTES TRIBUNAL

AND

IN THE MATTER OF SENIOR RESIDENT MAGISTRATE'S COURT AT NYAMIRA

AND

IN THE MATTER OF L.R. NO. KITARU SETTLEMENT SCHEME/55

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN, BORABU DIVISIONAL

LANDS DISPUTES TRIBUNAL 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE NYAMIRA 2ND RESPONDENT

JOHANA NYOKWOYO BUTI 3RD RESPONDENT

HUDSON MAYAKA NYOKWOYO 4TH RESPONDENT

BEUTAH ONSOMU RASUGU

(suing as Attorney of DANIEL WALTER RASUGU OMARIBA) SUBJECT

RULING:

The subject BEUTAH ONSOMU RASUGU has brought this application under order 53 rule 3(1) CPR seeking for an order of certiorari to issue removing the proceedings of Borabu Land Dispute Tribunal and the same to be quashed in regard to land parcel No. Kitaru Settlement Scheme/55. In prayer 2 he seeks court to remove and quash courts proceedings of Nyamira Senior Resident Magistrate court in Misc. application No. 2 of 2005. He also prays for costs. The application is said to be brought by the applicant suing as attorney of Daniel Walter Rasugu Omariba.

Mr. Migiro for the applicant submitted that the decision of Borabu Division Land Disputes Tribunal was reached without giving the subject/applicant an opportunity to be heard. He was not made a party to the dispute and the subsequent application filed in Nyamira Senior Resident Magistrate Court. He said following the decision of the Tribunal and the court the 3rd and fourth respondents have entered the suit land and committed acts of trespass. The subject stated that he has power of Attorney from the registered owner of the land and that he has brought the application on his behalf. He had obtained leave to file the application.

The 1st and 2nd respondent did not enter any appearances or documents to oppose the application. However the 3rd and fourth respondent opposed the application through Mr. Ogutu. Mr. Ogutu cited three grounds. First he said that the applicant is non-suited to bring this application. He is not the registered owner of the land in issue. The registered owner is Daniel Walter Rasugu. If he donated any powers of Attorney to the applicant the same was not registered as required by the law. He further submitted that even if there was power of Attorney donated the applicant could not file the suit in his name.

The second issue was that of leave obtained to file this application. He submitted that the same was obtained after the expiry of 6 months provided for. He further said that the format and process used to bring the application was irregular and defective.

It was also submitted that the decision which applicant seeks to quash is not annexed to the application.

Lastly it was submitted that the 3rd and fourth respondents are not judicial bodies capable of making decisions which can be quashed.

I have carefully considered the application and submissions. Indeed the applicant is non-suited to bring this application. He states that he is suing as attorney of Daniel Walter Rasugu the registered proprietor of land No. Kitaru Settlement Scheme/55. Mr. Migiro submitted that the exparte applicant has power of attorney. However there is no such power of Attorney registered as required by the law. The law is very clear that any power of attorney donated must be registered. In absence of any registration there can be no power of attorney.

Even if there was power of Attorney registered as required the exparte applicant could not bring the application in his own name. He could only file the application in the name of the registered owner and then prosecute it on his behalf. He would do so as his agent as provided for under Order 3 rules 1 & 2 CPR. Thus, in so far as the suit is brought in the name of another person makes it invalid.

The other issue is that of leave obtained to file this application. Application for leave was filed on 7th March 2005 and the same was granted. However the decision the subject applicant want quashed was made on 9th May 2004 – ten months before the application was filed. Provisions of order 53 rule 2 CPR are very clear. No leave should be granted to apply for an order of certiorari unless such application is made within six months of making such decision. The application for leave was therefore brought out of the provided period and leave ought not to have been granted. The leave granted was therefore null and void and as such this application does not lie.

Mr. Migiro for the applicant admitted the format of the application is not proper. 3rd and fourth respondents are individuals and cannot make any decision which can be quashed, yet they are shown as respondents in the applications.

They could only have been brought in as interested parties and not respondents.

From the above reasons therefore I find the application is not proper and has no merit. The same is dismissed with costs.

Dated 25th January 2006

KABURU BAUNI

JUDGE

Cc - Mobisa

Mr. Otieno for Mr. Ogutu for 3rd & 4th respondent

Mr. Soire for Mr. Migiro for the applicant.