



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Misc Appli 78 of 2003

IN THE MATTER OF LAND REFERENCE NUMBER SAMIA/BUDONGO/232

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT 1990

REPUBLICAPPLICANT

VS

THE FUNYULA LAND DISPUTE TRIBUNAL.....RESPONDENT

AND

1. WASHINGTON A. OKWABA)

2. WASIA OLUMA).....INTERESTED PARTIES

PROF HANNINGTON O. PAMBA.....APPLICANT

R U L I N G

The amended motion dated 4th March 2004 filed pursuant to the provisions of Order LIII rule 3 (1) of the Civil Procedure Rules sought to have the proceedings and ruling of Funyula Land Disputes Tribunal in land case No. 6 of 2001 and as adopted by the Senior Resident Magistrate's Court in Busia Land Dispute case No. 30 of 2002 removed to this court for quashing. The motion is accompanied by an affidavit sworn by professor Hannington O. Pamba. The application was also accompanied by a statutory statement as required by law.

The interested parties and the Respondent were served but none filed any response to the motion. However Mr. Omondi was instructed by the interested parties to appear for them at the hearing of the matter. The history of this matter is brief and straightforward. The material filed before this court shows that Washington Abangi Okwaba and Wasia Oluma the interested parties filed a claim before the

Funyula Land Disputes Tribunal claiming a portion of L.R. NO. SAMIA BUDONGO/232 from Professor Hannington O. Pamba the exparte applicant.

The litigants and their witnesses appeared before the aforesaid tribunal and were all heard. At the end of its deliberations the panel of elders awarded each of the interested parties 1.5 acres to be excised from L.R. No. SAMIA BUDONGO/232 on the basis that the duo had been in occupation of the aforesaid parcel of land for over 30 years. The panel of them directed the District Land Registrar to carry out survey work to parcel out the land as per its ruling.

The decision was then adopted as the order of Busia Senior Resident magistrate's court on 24th July 2002. The applicant now seeks to have the tribunal's decision and the adoptive order quashed on the following grounds.

First, it is argued that the Land disputes Tribunal had no jurisdiction to hear and determine claims based on adverse possession or title to land.

Secondly, that the title being sought to be defeated by the interested parties is a first registration. It is averred that the same is indefeasible pursuant to the provisions of section 143 of the Registered Land Act.

Thirdly, that the interested parties lodged a verbal claim without filing a written claim before the Land Disputes Tribunal. It is agitated that the Tribunal acted beyond its mandate when it entertained and heard a dispute without complying with Section 3 (2) of the Land Disputes Tribunals Act which requires that a claim must be in writing.

Basically the above grounds were raised in support of the amended motion. Though the interested parties did not file any reply as required, I still gave audience to Mr. Omondi their advocate to address me over the issues raised. The learned advocate did not address this court on the specific issues raised by the applicant. At this stage I think I will start dealing with the points raised by Mr. Omondi to resist the motion.

First, he was of the view that the tribunal's decision having been adopted rendered the tribunal functus officio. He was of the opinion that this court can only quash the decree of the Senior Resident magistrate's court.

I think the learned advocate misapprehended the point here. A close perusal of the motion will reveal that the applicant seeks to have the tribunal decision and the Senior Resident Magistrate's adoptive order quashed. The position is clear that whether the Tribunal is functus officio or not does not matter. This court has the jurisdiction to quash decisions of subordinate courts and quasi judicial tribunals which includes Land Disputes Tribunals which survive the demise of the tribunals or such courts.

The court of appeal was faced with a similar argument in the case between **DAVID MUGO T/A MANYATTA AUCTIONEERS AND THE REPUBLIC C.A. No. 265 OF 1997.** The court of appeal said:

“Where the body or authority against which certiorari is sought has ceased to exist or become functus officio but a decision it (body or authority) made is still enforceable certiorari must issue to quash or nullify that decision, if it is bad.”

Secondly, it is also averred that the applicant did not serve the Deputy Registrar of this court with the statutory notice as per the provisions of order LIII rule 2 (2) of the Civil Procedure rules. Mr. Wanyama who appeared for the ex parte applicant opposed this ground and pointed out that the Notice was served and that is why the applicant obtained leave.

I have perused the proceedings placed before this court and I am satisfied that the applicant served the requisite notice upon the Deputy Registrar. This ground therefore is rejected.

As far as I am concerned these were the only serious issues which were raised by Mr. Omondi for the interested parties. I will now deal with the merits of the grounds raised by the applicant in support of the amended motion.

The first ground is to the effect that the Land Disputes Tribunal did not have jurisdiction to hear and disputes concerning title to land or a claim based on adverse possession.

The jurisdiction of Land Disputes Tribunals is set out under Section 3 (1) of the Land Disputes Tribunals Act as follows: "Subject to this Act, all cases of a civil nature involving a dispute as to;

(a) The division of, or the determination of boundaries to land including land to be 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."

The basis of the Tribunal's decision is that the interested parties had stayed on the land in Dispute for a period of over 30 years. In essence the land was awarded to the interested parties by virtue of adverse possession. This is obviously outside the province of Land Disputes Tribunals whose made is limited as aforementioned. The tribunal therefore acted ultra vires its mandate. When a tribunal acts ultra -vires its jurisdiction then this court is entitled to quash the decision. The final order which was pronounced by the tribunal was made in excess of its jurisdiction. An order of certiorari will issue not only for excess of jurisdiction but also in respect of an error of law on the face of record.

The second ground raised was that the tribunal lacked jurisdiction to hear and determine a dispute over title to land and in view of the fact that the Land in Disputed was a first registration.

It should be stressed that Land Disputes Tribunals have no jurisdiction to entertain a claim over title to land leave alone a title of a first registration. I agree with the applicant that the Tribunal acted in excess of its jurisdiction to deal with a claim of this nature. It is simple, the tribunal was not empowered by statute to handle dispute before it.

The final matter raised is that the tribunal handled a dispute which was not in writing as per Section 3 (2) of the Land Disputes Tribunals Act. The applicant further argued that he was not served with the actual claim. I think the comprehensive procedure set out under Section 3 was meant to assist the litigants to properly lay the basis of their claims. I find that the provisions of S. 3 to mandatory. Though they are mandatory, a party must show that the non-compliance of the procedural requirements substantially prejudiced him. In this matter it is evident that the applicant participated throughout in the tribunal proceedings. There is doubt whether he was prejudiced in any material respect. Where the applicant has not been prejudiced then this court will not issue the order of certiorari.

For the above reasons the amended motion dated 4th March 2004 is allowed as prayed with costs to the applicant.

DATED AND DELIVERED THIS 4th DAY OF March 2005

J.K. SERGON

JUDGE

