



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

MISC. APP. NO. 53 OF 2005.

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

IN THE MATTER OF AN APPLICATION BY JAMES OCHUNGA FOR AN

ORDER OF CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

AMUKURA LAND DISPUTES TRIBUNALRESPONDENT

JOHN MAENDE.....INTERESTED PARTY.

JUDGMENT.

1. This judgment is on a judicial review application filed on 29th April, 2005 and dated the same. The application was filed by the Exparte Applicant - **JAMES OCHUNGA** - against the respondent - **AMUKURA LAND DISPUTES TRIBUNAL** - with **JOHN MAENDE** as the interested party.

2. Two prayers are sought as follows:

Prayer (a) An order of certiorari to call into the High court and quash award made by the Amukura Land Disputes Tribunal as adopted by Senior Resident Magistrate's court at Busia on 19th June 2003 as the judgment of the court vide Busia Resident Magistrate court L.D.NO. 12 OF 2003.

Prayer (b) Costs of the application be provided.

3. On 28th October ,2015, both parties agreed that the application be disposed of by way of written submissions. Subsequently, the Exparte Applicant filed submissions on 3rd December, 2015. The

interested party filed his on the same date.

4. A look at the court file shows that this is a matter that has dragged in court for long. I do not see the application for leave to bring judicial review proceedings. And the record does not show that such leave was ever granted. The application in the court file has its own shortcomings. It is accompanied by a statement of facts but it lacks the affidavit that is supposed to verify facts.

5. The statement of facts is supposed to contain the relief sought, the grounds on which the relief is sought, and the name and description of the applicant. The statement of facts herein contains all these but additionally also includes facts to be relied upon. Such facts should be in the verifying where the deponent can vouch for them on oath.

6. In the submissions of the interested party, a replying affidavit is said to have been filed here on 9th July, 2014. That replying affidavit is not in the court file.

7. I have tried to highlight all this in order to show that the foundational aspects of this case are wanting. Both sides filed submissions expecting that I will look into the merits of the case and write a judgment. Submissions are filed to articulate the applicable law and/or interpret asserted or proven facts. The replying affidavit now missing and the verifying affidavit lacking in the application would have served to show the court what the facts are. Unfortunately, these two vital documents are lacking.

8. I will not say much concerning the replying affidavit. The ultimate loser is not the interested party; it is the Exparte applicant. I will therefore focus on the shortcomings in the Exparte Applicants case. And these shortcomings are two viz:

- i. Failure to demonstrate that leave was granted and
- ii. Failure to accompany the application with an affidavit.

9. An explanation is in order. I begin with the first one, which is about leave. It is at the leave stage that the court gets to have a preliminary view of the merits of the application. The application for leave is supposed to contain enough details to enable the court to make up its mind whether the expate Applicant has a case that should go to the next stage. It is at this stage too where the court establishes whether the Exparte Applicant has **LOCUS STANDI** or whether he is a mere busy body wasting the court's precious time. At this stage too, the court scrutinizes the application to ensure that there has been no delay in seeking relief. In this application herein, the order sought is one of **CERTIORARI**. The law requires that it be sought within 6 months of making a decision or order. Details about leave would have enabled the court to establish whether there was compliance with this mandatory requirement.

10. I now come to the second shortcoming, which is failure to file affidavit. All evidential facts should be set out in the affidavit. Facts are not set out in the statement. For this, one needs to read the case of **R V KENYA REVENUE AUTHORITY & Another EXPARTE TRANSOUTH CONVEYORS LTD.,** Misc App. NO. 57 of 2005 (unreported). And it has been held in a number of cases that failure to file an affidavit is fatal to the application. For this, see for instance **R V CHIEF MAGISTRATE COURT (MILIMANI COMMERCIAL COURT) EXPARTE PATRICK PADDY OOKO: MISC.APPL.1116/03 (unreported)**

11. I think that from the above highlight of the law, it can be seen that the Exparte Applicant approached his case rather casually. He needed to show that leave was granted. In fact all details about such leave including the application should be in the court file. It behoved the Exparte Applicant to appreciate that the law enjoins that it is only the statements of facts and the affidavit used in the application for leave which are supposed to be used again in the substantive application.

12. And concerning the affidavit, it is obvious that failure to avail it deals the case a fatal blow. It is therefore clear that I do not need to look at the submissions. As filed, they are unhelpful. The case before me is a complete non-starter and I dismiss it with costs.

DATED AND DELIVERED THIS 9TH DAY OF MARCH 2016.

A.K.KANIARU

JUDGE

IN THE PRESENCE OF;

PLAINTIFF.....

DEFENDANT.....

COUNSEL.....

9/3/2016.

A.K. Kaniaru, J

Ichuloi — CC

No party present.

Interpretation - English/Kiswahili.

M/S Adala for Onsongo for Exparte Applicant.

M/S Maloba (absent) for interparty.

COURT - Judgment read and delivered in open court. Right of appeal in 30 days.

A.K.KANIARU

JUDGE

9/3/2016