



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**MISCELLANEOUS CIVIL APPLICATION NO. 135 OF 2011**

IN THE MATTER OF APPLICATION BY DOUGLAS KHATITI TATI AND LINET KHATITI TATI  
FOR ORDERS OF CERTIORARI AND PROHIBITION

**AND**

IN THE MATTER OF LAND PARCEL NO. SOUTH TESO/AMUKURA/1747

**AND**

IN THE MATTER OF ADOPTION PROCEEDINGS IN THE SENIOR PRINCIPAL MAGISTRATE'S  
COURT BUSIA SPMC NO. 56 OF 2011 GIVEN ON 11TH JULY 2011

**AND**

IN THE MATTER OF THE PROCEEDINGS AND DECISION OF THE AMAGORO LAND DISPUTE  
TRIBUNAL CLAIM NO. 29 OF 2007

**AND**

IN THE MATTER OF ISSUANCE OF A NEW TITLE DEED BY THE DISTRICT  
LAND REGISTRAR BUSIA/TESO

**BETWEEN**

REPUBLIC..... APPLICANT

**VERSUS**

AMAGORO LAND DISPUTES TRIBUNAL..... 1ST RESPONDENT  
THE SENIOR PRINCIPAL MAGISTRATE BUSIA..... 2ND RESPONDENT

**AND**

ALLOYCE ITIENG..... 1ST INTERESTED PARTY  
DISTRICT LAND REGISTRAR BUSIA/TESO ..... 2ND INTERESTED PARTY

**EXPARTE**

DOUGLAS KHATITI TATI ..... 1ST APPLICANT

LINET KHATITI TATI ..... 2ND APPLICANT

### RULING

1. The matter before court is chamber summons application dated 16.9.2011 brought under Section 8 & 9 of the Law Reform Act and Order 53 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The Exparte Applicants seek this court's leave to apply for an ORDER of CERTIORARI to quash the decision of the Amagoro Land Disputes Tribunal and an ORDER of PROHIBITION prohibiting the District Land Registrar Busia/Teso from issuing Alloyce Itieng Oriasi the 1<sup>st</sup> Interested Party with a title deed for the suitland South Teso/Amukura/1747.
2. The Application is premised on the provisions of the sections of the law cited, the affidavit verifying the facts sworn by Douglas Khatiti Tati and on the statement of facts filed with the application. In the statement, the Applicants have listed 4 grounds inter alia, that the decision of the Amagoro Land Disputes tribunal awarding 4 acres of land registration S.Teso/Amukura/1747 is ultra-vires as the Tribunal lacked jurisdiction under the Land Disputes Tribunal to deal with disputes relating to registered land.
3. On 27.10.2011 the Judge directed the application to be served on the Interested Parties and the Respondents. The 1<sup>st</sup> Interested Party, Alloyce Itieng subsequently upon being served filed a replying affidavit in opposition to the prayers sought in the chamber summons. The 1<sup>st</sup> Interested Party alleges the application is filed outside the statutory period. He also depones that he acquired proprietorship of the land by virtue of a transfer registered on 28.3.2007 and not on the basis of the decision of the Amagoro Land Disputes Tribunal. He annexed transfer documents and certificate of official search to confirm.
4. In a supplementary affidavit, the Applicants aver the 1<sup>st</sup> Applicant was pressurized to append his signature on the said documents. Further that not the whole parcel was sold and finally that the application was commenced within period provided by law.

### Submissions:

5. The Exparte Applicants filed their written submissions on 10<sup>th</sup> Sept 2013. The 1<sup>st</sup> Interested Party submissions filed on 11<sup>th</sup> Sept 2013 and annexed relevant case law. The Exparte Applicants have quoted Registered Land Act without indicating it is repealed and relating the quoted section with the provisions in the new Land Registration Act that replaced it.
6. The Exparte Applicants in their submissions has presented arguments as if the leave had been granted and therefore presenting their case for the court on the substantive motion. Their submission is already challenging the award of the Amagoro Land Disputes Tribunal. They are not giving reasons to this court why they should be granted leave to commence judicial review proceedings. I will therefore not reproduce the contents of those submissions here.
7. The 1<sup>st</sup> Interested Party has submitted that leave should not be granted, relying on the contents of their replying affidavit. They submit the application was not properly intituled and referred the court to the case of **Welamondi vs. Chairman Electoral Commission of Kenya [2002] IKLR 486, Mohamed Ahmed vs.R [1957] E.A 523 and Farmers Bus Service & 7 Others vs the Transport Licensing Appeals Tribunal [1959] E.A 779**. Further that the chamber summons “goes straight to seek the substantive orders as if leave had been granted.” That the present application has not passed the test for grant of leave as set out in the case of **Njuguna vs. Minister for Agriculture [2000] E.A 184** as the Exparte Applicants have no arguable case.

8. The 1<sup>st</sup> Interested Party also submitted the application was time-barred under the provisions of Order 53. That the award of the Tribunal was made on 31<sup>st</sup> December 2010 therefore six months lapsed on 30<sup>th</sup> June 2011. That the award is only adopted as an order of the court to assist parties with the execution process. The date of the award remains when it was made and not when it was adopted by court. Finally that it is the Exparte Applicants who moved the court hence they should not complain.

### **Determination**

9. I have perused the pleadings and considered the submissions. What is required of this court is to determine whether or not to grant leave sought to the Exparte Applicants to commence Judicial Review proceedings taking into account the opposition presented by the 1<sup>st</sup> Interested Party.

10. Under Order 53 Rule 4 provides that where the circumstances so require, the judge may direct that the application be heard inter partes before grant of leave. In **R. Vs. Judicial Service Commission exparte Daren**o [2004] I KLR 203 – 209, it was held that Judicial review orders are discretionary and are not guaranteed hence a court may refuse to grant them even where requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining.

11. Similarly in **Njuguna vs. Minister for Agriculture [2000] I E.A 184** cited by the Exparte Applicants, the Court of Appeal held that the test as to whether leave should be granted to an Applicant for Judicial review **is whether, without examining the matter in any depth, there is an arguable case that the reliefs sought might be granted on the hearing of the substantive application.**(underline mine for emphasis)

12. The 1<sup>st</sup> Interested Party has annexed in his replying affidavit a copy of certificate of Official Search showing that on 28.3.2007, he was registered as the proprietor of land parcel no. S. Teso/Amukura/1747 and issued with title deed on the same date. The dispute was presented before the Tribunal in 2007 vide claim no 29 of 2007. The elders made an award reached on 31<sup>st</sup> December 2010. The 1<sup>st</sup> Interested Party submits he will not require a new title deed as contained in prayer two of the award as he already had one even before the award was given.

13. The Exparte Applicants intend if leave is granted to seek the following reliefs;

(a). **THAT** this honourable court do issue an ORDER OF CERTIORARI to remove into High Court and quash the decision of the Amagoro Land Disputes Tribunal awarding the Interested Party Alloyce Itieng Oriasi the suitland, four (4) acres of land registration S. Teso/Amukura/1747 adopted by the Senior Principal Magistrate's Court Busia on 30<sup>th</sup> June 2011.

(b). **THAT** this honourable court do issue an ORDER OF PROHIBITION prohibiting the District Land Registrar Busia Teso from issuing the Interested Party Alloyce Itieng Oriasi a new title deed for the suit land, four 4 acres of land registration S. Teso /Amukura/1747 in line with the decision of the Amagoro Land Dispute Tribunal adopted by the Senior Principal Magistrate's court Busia on 30<sup>th</sup> June 2011.

14. As was held in the case of **R vs. Judicial Service Commission exparte Pareno** *Supra* and weighing the efficacy of the judicial remedy sought given the obtaining circumstances. The 2<sup>nd</sup>e exparte Applicant in her supplementary affidavit depones the title to the 1<sup>st</sup> Interested party was obtained using documents signed under duress by the 1<sup>st</sup> Applicant. In my view that is an issue touching on merits of the case. Yet judicial review orders question decision making process and not the merits of the case. The Applicants have not complained of that the land disputes tribunal process was questionable. Secondly, the award given by the Tribunal will not change the proprietorship of the suitland. Neither will

the reliefs to be sought create such change. This is because by the time the Tribunal gave its award, the 1<sup>st</sup> Interested Party was already the registered owner of the suit property. Even if the award of the Tribunal were to be quashed, it will not cancel the registration of the 1<sup>st</sup> Interested Party.

15. It is my finding therefore that the Applicants' application does not present an arguable case that can make this court to exercise her discretion and grant the order for leave to apply for judicial review orders. The Applicants failed to demonstrate that they have an arguable case. Having also considered all the issues ventilated in the preceding paragraphs, I find the application dated 16<sup>th</sup> Sept 2011 as lacking in merit and dismiss it with costs to the 1<sup>st</sup> Interested Party.

**DATED, SIGNED and DELIVERED** this 1st day of April 2014.

**A. OMOLLO**

**JUDGE.**