



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

JUDICIAL REVIEW NO. 23 OF 2012.

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW.

AND

**IN THE MATTER OF AN APPLICATION BY GADI OSALO FOR ORDERS OF
CERTIORARI**

REPUBLIC.....APPLICANT

VERSUS

FUNYULA LAND DISPUTES TRIBUNAL..... RESPONDENT

AND

ZACHARIA OLIMA.....INTERESTED PARTY

J U D G M E N T

GADI OSALO, the Applicant, through M/S. Wanyama & co. Advocates filed the notice of motion dated 11th August, 2012 and filed in court on 14th August, 2012 [date of payment of filing fees] for an order of certiorari calling into this court the Funyula Land Disputes Tribunal Award adopted in Busia Senior Principal Magistrate's court Land Dispute case Number 46 of 2011 on 9th March, 2011 for quashing. He also prays for costs. The application is said to be based on the grounds on the statutory statement filed and served with the application for leave among others. The grounds includes:

1. That the tribunal exceeded its jurisdiction set out in section 3 of Land Disputes Tribunal Act as its decision affected land comprising the estate of a deceased person contrary to the provisions of the Law of Succession Act.
2. That the Tribunal entertained a claim that was statute barred contrary to section 13 of the Land Disputes Tribunals Act.
3. That the tribunal's decision is ultra vires as it made a determination based on adverse possession which is a preserve of the superior court.
4. That the tribunal was improperly constituted.

The application is opposed by Zacharia Alima, the Interested Party, through the replying affidavit indicated to have been sworn on 9th December, 2014 but filed on 9th December, 2013 through M/S. Bagonko, Otanga & company advocates. The Interested Party, inter alia depones to the following;

1. That he had on 29th September, 2009 filed Funyula Land Dispute Tribunal case number 26 of 2009 claiming the whole of Samia/Budongo/199 and the ruling was read to the parties on 6th November, 2009 awarding him half the share.
2. That the tribunal's award was adopted by the court in Busia PMCC. No. 46 of 2011 on 9th March, 2011.
3. That the Applicant's application for leave to file application for certiorari orders was filed outside the six months set out in Order 53 Rule 2 of the Civil Procedure Rules.
4. That the application for leave was granted on 23rd July, 2012 in Busia Misc. Civil application No. 143 of 2011 requiring that the substantive application be filed in 21 days.
5. That the substantive application dated 11th August, 2012 was filed on 14th August, 2012 but date stamped '13th August, 2012', which was outside the period of 21 days prescribed in the order of 23rd July, 2012 and should be struck off.

The Applicant filed a supplementary affidavit sworn on 11th March, 2014 responding to the replying affidavit by the Interested Party and in it, the Applicant depones as follows;

1. That the 21 days granted on 23rd July, 2012 was to start on the 24th July, 2012 thereby expiring on 13th August, 2012 and not 12th August, 2012 which in any case was a Sunday.
2. That the 12th August, 2012 having fallen on a Sunday which is not a court working day, required the filing that was due that day be done on 13th August, 2012.
3. That the substantive application was submitted to the court registry on the afternoon of 13th August, 2012 and received by date stamping but payment was not done until the following, the 14th August, 2012, as the cashier was out of the office that afternoon.
4. That the award being challenged got adopted on 9th March, 2011 when the right of appeal was explained.

Both counsel agreed to have the application disposed through written submissions. The counsel for the Applicant filed the written submissions dated 25th March, 2014 on 26th March, 2014 while Interested Party's counsel filed his dated 24th April, 2014 on 25th April, 2014.

SUMMARY OF APPLICANT'S SUBMISSIONS.

1. That the tribunal award amounted to conferring beneficial interest to land ownership which was outside the powers conferred to the tribunal under section 3 of the Land Disputes Tribunal Act of 1990.
2. That the tribunal failed to appreciate that the suit land had been owned equally by the Applicant and his deceased father whose estate had not been succeeded and the whole proceedings before the tribunal were therefore incompetent as held in Busia HCCA No. 24 of 2002, ***Fred Nyongesa Osolo –vs- Prof Agola Auma Osolo.***
3. That the Interested party's claim was statute barred and offended the provisions of section 13 of the Land Disputes Tribunal Act and the Land Adjudication Act.
4. That the finding by the tribunal that Interested Party was entitled to the land under the doctrine of adverse possession was ultra vires the Land Dispute Tribunal Act.
5. That the tribunal was improperly constituted by having eight members even though only seven members signed the award.
6. That the tribunal proceedings do not indicate that the award was read to the parties on 6th September, 2009 as claimed by the Interested Party.
7. That the tribunal proceedings do not show that the right of appeal was explained to the parties to enable the Applicant decide what option to take.
8. That the Applicant acquired the right to commence Judicial Review or appeal after the award was adopted and right of appeal explained by the court on 9th March, 2011 and was within the six months period when he filed the application for leave on 19th July, 2011.
9. That the 21 days granted on 23rd July, 2012 within which to file the substantive application ended

on 13th August, 2012 when the application was received and date stamped at the registry, and the delay in paying the filing fee to the next day does not make the application incompetent.

SUMMARY OF THE INTERESTED PARTY'S SUBMISSIONS.

1. That land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. Counsel referred the court to a passage in Laws of Succession by W.M.MUSYOKA, at page 3, which states;

“ Property is capable of passing upon death other than by will. It may pass by survivorship.....This applies in cases of joint tenancies that is where property is jointly owned. Where a co-owner of property is a beneficial joint-tenant of the property, their interest will automatically pass to the surviving tenant upon their death by virtue of the principle of survivorship....The principle of survivorship operates to remove jointly owned property from the operation of the law of succession upon the death [of one of the joint tenants]....”

2. That the tribunal's decision only dealt with the size of the land that the Interested Party was entitled to and not conferment of ownership rights.
3. That though the tribunal proceedings has eight names and only seven of the eight signed, then the one who did not sign the award cannot be said to have been a member of the tribunal that made the award. Counsel referred the court to the decision in **Republic –vs- Chairman Land Dispute Tribunal Amukura Division & 2 others Exparte Jared M. Mwimali** [2014] eKLR , where the court said;

“Though the name of Alleys Akhudu appears between the other two names, there is no signature next to that name and the court cannot tell whether he was indeed a member of the Tribunal that heard the dispute.”

4. That considering the suit land was yet to be registered in the names of Applicant following the death of the co-owner, the land was then not registered land and was therefore within the province of the Land Disputes Tribunal.
5. That the powers of the tribunal under section 3(1) of the Land Disputes Tribunal Act included disputes on ‘division of ‘ Land and the tribunal was within their power to award one half to the Interested party.
6. That the tribunal award was valid and the application should be dismissed with costs and interests. Counsel then set out the three references they relied on at page 4 of the submissions but did not avail copies of the same to the court.

ISSUES FOR DETERMINATION.

1. Whether the tribunal had jurisdiction to entertain the claim that the Interested Party had lodged.
2. Whether the tribunal that handled the claim had been properly constituted.
3. Whether the award of the tribunal was in excess or outside its jurisdiction.
4. Whether the parties got to know the tribunals award, and if so, when.
5. Whether the application for leave to file the substantive application was filed within six months from the date of the award.
6. Whether the six months period runs from the date of the award or the date the award is adopted in court.
7. Whether substantive application was filed within the 21 days as ordered by the court on 23rd July, 2012.
8. Whether the Applicant is entitled to the orders sought.

Having considered the evidence presented by both the Applicant

and the Interested Party in the form of affidavits and the annexure thereto and further having considered

the submissions by both counsel, the court finds as follows;

1. That the Interested Party filed Funyula Land Disputes Tribunal case number 25 of 2009 claiming for the suit property, Samia/Budongo/199 to be transferred to him. This is discernable from the heading of the copy of the Tribunal proceedings under the item "claim" and also from his testimony before the tribunal where he inter alia stated **".....I have stayed in the same land from 1948 to date. The Defendant (now the Applicant) claims that land belongs to him.....I found that my parcel was in Gadi Osalo's (Applicant) and Paul Ogale so I request Gadi to surrender....."**
2. That the tribunal, after hearing the parties and the witnesses, made their award on 6th October, 2009 in which they first made a finding that **".....Paul Osalo and his son Gadi Osalo are the registered owner to the land parcel Samia/Budongo/199 before,"** directing that they should share it equally with Zacharia Olima Okumu (Interested party). From the evidence presented by the Applicant in this court, his father Paul Osalo died in 1983. This court therefore takes that when the tribunal made their award on 6th October, 2009 they meant that the Applicant and Interested party share land parcel Samia/Budongo/199 equally as it was evident Paul Osalo had passed away.
3. That the jurisdiction of the Funyula Land Disputes Tribunal was as limited under section 3 (1) of the land disputes tribunal Act 1990 which stated as follows;

"3. (1) Subject to this Act, all cases of civil nature involving a dispute as to-

- a. **The division of, or the determination of boundaries to land, including land 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 Land Disputes Tribunal Act 1990 has since been repealed under section 31 of Environment and Land court Act No. 19 of 2011. The power of the Tribunal did not include the power to determine ownership of registered land which is actually the claim the Interested Party had filed before the Tribunal. There is no dispute that the suit land was registered land in the names of Applicant and his deceased father. It follows therefore that the tribunal did not have the power to award the Interested party ownership of half the suit land as they did in their award in view of the provision of section 159 of the Registered Land Act, chapter 300 of Laws of Kenya (Now repealed) The award was therefore ultra vires the tribunal powers.

4. That section 4 (2) of the Land Disputes Tribunals Act required the tribunal to consist of a Chairman and two or four other members making a membership of three or five members. The Act had no provision for a tribunal consisting of more than five members. The tribunal proceedings shows the panel that heard the matter between Applicant and Interested party had eight members even though only seven signed the award. The court would obviously take the position that only the seven who signed the award were involved in making the decision. However, their number exceeded the number prescribed under section 4 (2) of the Act which stated as follows:

"4 (1) There shall be established a tribunal, to be called the Land Disputes Tribunal, for every registration district.

(2) Each Tribunal shall consist of-

- a. **a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and**
- b. **either two or four elders selected by the District Commissioner from the panel of elders appointed under section 5."**

The court holds therefore that the tribunal was improperly constituted as its membership contravened the clear provision of the law.

5. That the copy of tribunal proceedings does not indicate whether and when the award was read to the parties. The space provided for the parties to sign is blank, making the court to conclude that they were never asked to append their signatures or that they declined or were absent. It would therefore be unfair to say that the time for filing an appeal or judicial review application started to run against the parties from the date of the award without evidence that it was on the same date that parties got to know the contents of the award. Time will therefore be taken to have started running from the date disclosed to the court to be the date the award was brought to the attention of the parties. None of the parties have been clear on this and the court will take that date to be 9th March, 2011 when the award was read over and adopted as judgment of the court.
6. That the Applicant filed the application for leave to file the substantive application on 19th July, 2011. The Applicant was therefore within the six months period prescribed under Order 53 Rule 2 of the Civil Procedure Rules as the court has taken 9th March, 2011 to be the date time started running.
7. That the application for leave was granted on 23rd July, 2012 giving the Applicant 21 days within which to file the substantive application. The substantive application dated 11th August, 2012 and date stamped 13th August, 2012 was filed in court on 14th August, 2012. The filing of a court process is not the date the registry receives it for assessment of the fee payable but the date the filing fees is paid except where payment of fees is exempted.
8. That Order 50 Rule 3 and 8 of the Civil Procedure Rules are therefore relevant in deciding on the dispute as to whether the substantive application was filed within the 21 days as directed in the order of 23rd July, 2012. The two rules states:

***“3 where the time of doing any act or taking any proceedings expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceedings cannot be done, or taken on that day, such act or proceedings shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day which the offices shall next be open.*”**

8. In any case in which particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

The more relevant provision is rule 8 which says that when computing the days, the first day is excluded while the last day is included. This clearly means that when calculating the 21 days prescribed on 23rd July, 2012, the counting should exclude the first day which is the 23rd July, 2012. Therefore counting starts from the 24th July, 2012 and 21 days ends on 13th August, 2012. The last day of the 21 days was therefore 13th August, 2012 which was a Monday. The Applicant was required to have filed the substantive application by close of business on 13th August, 2012 but as pointed out above, he did not do so until the next day, the 14th August, 2012. It appears he did so without obtaining the consent of the other parties or obtaining the court's blessing to extend the time as provided for under Order 50 Rule 7 of the Civil Procedure Rules which states:

“7. The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”

9. That the superior courts have in various decisions held that a document is deemed to be validly filed upon payment of the filing fees. This issue was dealt with by my brother **Odunga J**, in **Republic –vs- Public Procurement Administrative review Board & 2 others** [2013] eKLR where he referred to among others the decision in **Unta Exports Ltd –vs- Customs Kampala**

HCCC. NO.403 of 1968 [1970] E.A 648 where it was held;

“There is no doubt whatsoever that both as a matter of practice and also as a matter of law that documents cannot validly be filed in the Civil Registry until fees have either been paid or provided for by general deposit from the filing advocate from which authority has been given to deduct court fees. In this case it is admitted that there was no such general depositmere entry in the column of a register or note by a clerk on the back of a letter certainly cannot override the omission to pay or provide for the necessary fees at the time of the alleged filing. Accordingly, the plaint was filed out of time, having not been properly filed until the date when the fees were paid.”

10. That in this particular matter, there is no evidence that the advocate appearing for the Applicant had made a general arrangement for payment of fees. There is no affidavit provided by the registry staff or cashier to confirm that the cash office was not operational on the afternoon of 13th August, 2012. The advocate’s clerk who visited the registry on 13th August, 2012 and had the application date stamped did not provide an affidavit on why the filing fees was not paid on that date and what Applicant deponed to about the reasons for failure to pay the filing fees on 13th August, 2012 is nothing but hearsay.

Even though there may have been good cause, as shown above, to impugne the Funyula Land Disputes Tribunal award, the substantive application was filed outside the time set in the court order of 23rd July, 2012 and is therefore improperly before the court. The application, however meritorious it may have been, is hereby struck out with costs to the Interested Party.

It is so ordered.

S. M. KIBUNJA.

JUDGE.

DATED AND DELIVERED ON 04th DAY OF JUNE, 2014

IN THE PRESENCE OF; MR. WANYAMA AND MR. OTANGA FOR EXPARTE APPLICANT AND INTERESTED PARTY RESPECTIVELY.

JUDGE.