



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 49 “B” OF 2012**

***[formerly Busia misc. application no. 185 of 2011]***

**JOHN KAYELI OLAKA & .....APPLICANT**

**VERSUS**

**1. ALFRED A. OLAKA**

**2. LAWRENCE M. OLAKA**

**3. HOSKIN INDIMULI OLAKA ..... RESPONDENTS**

**AND**

**1. ISAAC WANYONYI MASINDE**

**2. GEORGE BIKETI WAFULA .....INTERESTED PARTIES**

**RULING**

1. The applicants herein are Isaac Wanyonyi Masinde and George Biketi Wafula. They have filed this notice of motion under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 45 rule 1 and 51 rule 1 of the Civil Procedure Rules seeking the court to review and or set aside the order made on 27<sup>th</sup> April 2011 to the effect that the Executive Officer Kimilili court signs all relevant documents on behalf of the objectors/respondents to transfer parcel nos. 5386 and 4782 in the name of the 1<sup>st</sup> claimant. They also prayed for costs of the application.

2. The application is supported by the grounds on the face of it and two affidavits deposed by each of the applicants. The claimants/respondents and objectors/respondents were served but they have not filed any documents to challenge the motion. I will thus consider the motion on its merits though it is unopposed.

3. This application ought to have been heard by Kimilili Senior Principal Magistrate's court that issued the order sought to be reviewed. However when the Environment and Land Court Act became operational, all land matters were transferred to the Environment and Land Court. Secondly, there were two matters pending before the high court vide Bungoma HCCC no. 10B of 2012 and Bungoma HCC no. 185 of 2011 which touched on the same subject matter and some of the parties herein. Muchemi J made an order on 15<sup>th</sup> May 2012 transferring Kimilili SRMC land case no. 22 of 2008 to the court. I thus agreed on the basis to hear the application.

4. The applicants aver that they are the registered owners of L.R. Bungoma/Kamukuywa/5086 and 4782 respectively and have annexed copies of their titles to the application. They were not parties to the case that was before the Tongaren Land Disputes Tribunal hence they are being divested of their titles without being heard. I have perused the proceedings and award of the Tongaren Division Land Disputes Tribunal, the land parcels indicated to be in dispute and which was awarded were Bungoma/Kamukuywa/834, 835 and 836 which originated from Bungoma/Kamukuywa/593 to the claimants. The applicants have annexed copies of the decree from Kimilili SRM's court in land case no. 22 of 2008 and a decree in Bungoma CMC land case no. 35 of 2009. In the first decree, the applicant's titles are amongst those included in the order to be transferred to the claimants/respondents.

5. From the proceedings of the Divisional Tribunal, it is not clear how several other numbers were included in the vesting order yet they were not contained in the award. The 2<sup>nd</sup> decree from Bungoma CM's court shows the appeal to Western Province Land Dispute Appeals Committee was successful. This court was able to find and read the proceedings of the appeals committee which revoked the decision of the Tongaren Land Disputes Tribunal. The decision of the Appeals Committee after adoption became the decree which remains as an order of the court. I find two reasons why I should allow the motion as satisfying the requirements of order 45. First the applicants were never party to the tribunal and the Tongaren land Disputes Tribunal never included their parcels of land in their award. They qualify as parties aggrieved under order 45. Secondly, if the decision of the Tongaren Division Land Disputes Tribunal was overturned on appeal then there was no decree capable of being executed in Kimilili Land case no. 22 of 2008 hence there is an error apparent on the record. Consequently I allow the application to the extent that the order dated 27<sup>th</sup> April 2011 which directed the Executive Officer Kimilili court to sign transfers and all relevant documents transferring L.R. 5086 and 4782 is hereby reviewed and is set aside. This order is strictly applicable to the two parcels of land the subject of this application. Costs of the application are not awarded as the application was not opposed.

**Dated and Delivered** in Bungoma this 7th day of October 2014.

**A. OMOLLO**

**JUDGE.**