



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**JUDICIAL REVIEW NO. 24 OF 2009.**

**IN THE MATTER OF AN APPLICATION BY GABRIEL ONYANCHI SUNDIA FOR  
ORDERS OF LEAVE OF THIS HONOURABLE COURT TO APPLY FOR ORDERS OF  
CERTIORARI AND PROHIBITIONS**

**AND**

**IN THE MATTER OF THE DECISION AND FINDINGS OF FUNYULA LAND DISPUTES  
TRIBUNAL CASE NO. 33 OF 2008.**

**BETWEEN**

**GABRIEL ONYANCHI SUNDIA**

**-VERSUS-**

**FRANCIS TOBIAS AKELLO.**

**REPUBLIC .....PLAINTIFF**

**=VERSUS=**

**FUNYULA LAND DISPUTE TRIBUNAL ...**

**BUSIA PRINCIPAL MAGISTRATE..... RESPONDENTS**

**AND**

**FRANCIS TOBIAS AKELLO.....INTERESTED PARTY**

**J U D G M E N T.**

**GABRIEL ONYANCHI SUNDIA**, the exparte Applicant, through Balongo & company advocates, by the notice of motion dated 16<sup>th</sup> December, 2009 pray for an order of certiorari to call into this court and quash “the Provincial Land Dispute Appeal Committee Western Province and Funyula Land Dispute Tribunal Funyula Division” award dated 19<sup>th</sup> December, 2008 and subsequent orders in Busia PM Land Dispute case No. 106 of 2008. The Exparte Applicant also prays prohibition order against the Funyula Land Dispute Tribunal and Busia Principal Magistrate court from enforcing and executing the award/judgment and costs.

The Exparte Applicant named Funyula Land Dispute Tribunal and Busia Principal Magistrate as the

Respondents. He also named Francis Tobias Akello as the Interested party.

The application is based on the following three grounds:

“ 1. That the Respondent exceeded its statutory jurisdiction to cancel title in respect of L.R. Samia/Luanda – Mudoma/1369.

2. The Provincial Land Dispute Tribunal is unimplementable without letter of administration intestate being taken out in respect of Lucas Sundia, Oduma Muga and Okochi Muga who are all deceased.

3. That the decision of the Provincial Land Appeal Committee Western Busia (sic) and Funyula Land Dispute Tribunal and all subsequent proceedings are bad in law, null and void ab initio (sic) against the rules of natural justice, inter alia and should be quashed.”

The Interested Party, Francis Tobia Akello opposed the application through the replying affidavit sworn on 13<sup>th</sup> October, 2010 and filed through M/S. Nyandieka & Associates Advocates. The Interested Party deponed to the following among others;

- a. That no leave was sought and obtained before filing the substantive application and therefore certiorari orders cannot issue.
- b. That the Exparte Applicant did not disclose that the application for leave was time barred.
- c. That the annexures are not referred to in the verifying affidavit.
- d. The relief sought in the application are different from those in the statutory statement.

The hearing of this application proceeded by way of written submissions. The Exparte Applicant filed his dated 10<sup>th</sup> January, 2012 and 8<sup>th</sup> July, 2014. The Interested Party filed written submissions dated 11<sup>th</sup> June, 2012 and 24<sup>th</sup> September, 2014.

I have carefully considered the pleadings and submissions filed by the Exparte Applicant and Interested Party and before coming to the findings of the court, it is desirable to set out the details of the papers filed by the opposing sides.

### **THE START.**

1. The Exparte Applicant moved this court through the Busia H.C. Misc. App. No. 153 of 2009 through the chamber summons dated 9<sup>th</sup> September, 2009 and filed on 22<sup>nd</sup> September, 2009. The chamber summons was filed together with Affidavit in support, statement of facts and verifying affidavit all dated and or sworn on 22<sup>nd</sup> Septemebr, 2009. To the Affidavit in support was annexed a copy of Funyula Land Dispute Tribunal proceeding and award in case No. 33 of 2008 and proceedings and extracted order in Busia PMC. Land Dispute No. 106 of 2008 all marked “GOSI.”
2. That when the matter was first placed before the Judge on 7<sup>th</sup> October, 2009, a note was made directed to the Deputy Registrar to ensure a copy of the award was availed.
3. The entry by the Deputy Registrar of 1<sup>st</sup> December, 2009 shows the earlier directions by the judge were complied with before the Honourable Judge granted leave on 3<sup>rd</sup> December, 2009 in the following terms;

“ *Leave is hereby granted to operate as stay. Main application to be filed in 21 days.*”

4. That the exparte chamber summons dated 9<sup>th</sup> September, 2009 and filed on 22<sup>nd</sup> September, 2009 had sought for the following order;

“ a) **The Applicant be and is hereby granted leave to file for Judicial Review seeking for orders of certiorari quashing the award and findings of Funyula Land Dispute Tribunal No. 33 of**

**2008 dated 19<sup>th</sup> December, 2008 and prohibition against Busia Principal Magistrates Land Dispute No. 106 of 2008.”**  
**[Emphasize mine]**

It is important to note that the application for leave does not mention anything to do with the award of the Provincial Land Disputes Appeal Committee, Western Province. There was therefore no leave applied for and obtained to file for certiorari orders to quash the decision of the Provincial Land Disputes Appeal Committee Western Province.

5. That the statement of facts on the reliefs sought states at paragraph 2 (i) as follows;

“ i) ***An order for certiorari directed against the Provincial Land Dispute Appeal Western Province to remove into this court and quash the decision/findings contained in their award dated 18<sup>th</sup> August, 2009 in respect of L.R. Samia/Luanda – Mudoma/693.***”

The statement of facts has made reference to the Funyula Land Disputes Tribunal in ground “C” at page 2.

**THE SUBSTANTIVE APPLICATION**

6. The notice of motion dated 16<sup>th</sup> December, 2009 was filed on the same date 16<sup>th</sup> December, 2009. It sets out the order sought as follows:

“ a) ***An order for certiorari do issue directed against the Provincial Land Dispute Appeal Committee Western Province and the Funyula Land Disputes Tribunal, Funyula Division to move this court and quash the award dated 19<sup>th</sup> December, 2008 in respect of L.R.Samia/Luanda – Mudoma/1369 together with the proceedings and subsequent adoption and judgment in Busia Principal Magistrate Land Dispute No. 106 of 2008.***” [Emphasize mine]

**FINDINGS.**

Having considered the materials and evidence presented to the court by both the Exparte Applicant and Interested Party, the court finds as follows:

1. That the leave granted in Busia H.C.Misc. Application No. 153 of 2009 was for filing a substantive application for orders of certiorari against the “ **award and findings of Funyula Land Dispute Tribunal No. 33 of 2008 dated 19<sup>th</sup> December, 2008.**” There was no leave sought to file an application to quash the award and or finding of the Provincial Land Dispute Appeal Committee, Western Province in case No. 14 of 2009 which was adopted in Busia PMC. Land case No. 106 of 2008 on the 18<sup>th</sup> August, 2009.
2. That the Exparte Applicant did not annex or avail a copy of the Provincial Land Dispute Appeal Committee, Western Province award in case number 14 of 2009 during the leave application stage and even during the filing and hearing of the substantive application. The court can only gather what possibly the contents of their award was from the court order of 18<sup>th</sup> August, 2009 which was extracted on 18<sup>th</sup> November, 2009 which is in the bundle of documents marked “GOSI” and annexed to the Affidavit in support sworn by Gabriel Onyachi Sundia on 22<sup>nd</sup> September, 2009. Therefore as provided for under Order 53 Rule 7 (1) of the Civil Procedure Rules, the Exparte Applicant cannot challenge the validity of the decision of the Provincial Land Disputes Appeals Committee Western Province.
3. That in the absence of a copy of the proceedings and award of the Provincial Land Dispute Appeal Committee, Western Province, the court is unable to establish with certainty the date of their decision in case No. 14 of 2009. The date cannot also be ascertained from the proceedings and order in Busia PMC. Land case No. 106 of 2008 which is among the documents attached to the Affidavit in support and marked “GOSI”. The Interested Party’s contention that the application for leave was made outside the six months period was specifically in reference to the date of the Funyula Land Disputes Tribunal’s decision and not the Provincial Land Disputes

Appeal Committee (*See paragraph 3 (ii) of the replying affidavit.*)

4. That the Exparte Applicant and the Interested party are in agreement that the Funyula Land Disputes Tribunal decision in Case No. 33 of 2008 was appealed in the Provincial Land Disputes Appeals Committee, Western Province in case No. 14 of 2009. It is further agreed by the two parties that the Provincial Land Disputes Appeals Committee, Western Province upheld the decision of the Funyula Land Disputes Tribunal. The application for leave should therefore have been for leave for certiorari order to call into this court and quash the decision of the Provincial Land Disputes Appeals Committee and not Funyula Land Disputes Tribunal.
5. That under Order 53 Rules 1 and 2 of the Civil Procedure Rules, leave should be granted. “***If the court considers, without going into the matter in depth, that there is an arguable case for granting leave,***” as held by the Court of Appeal in ***Samuel Muchiri W’Njuguna & 6 others –vs- The Minister for Agriculture & Another Nairobi C.A.C.A No. 144 of 2000***. The court further held that;

“ ***The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave, to set aside such leave.***”

The Interested Party herein is challenging the issuance of the leave through the submission in respect of the hearing of the substantive application. The Interested Party ought to have challenged the leave granted before the hearing of the main application for judicial review order but did not do so. The challenge of the leave could also have been through raising of a preliminary objection as confirmed in the case of ***Odinga & Others –vs- Nairobi city Council [1990 -1994] E.A.,482 and RE AN APPLICATION BY GIDEON WAWERU GATHUNGURI [1962] E.A, 520***.

The Interested Party cannot therefore challenge the leave granted in Busia HC. Misc. Application 153 of 2009 through the submissions in respect of the hearing of the substantive application.

6. That notwithstanding the finding in (5) above, and considering both parties are in agreement that the decision sought to be quashed was made more than six months from the date of filing of the application for leave in Busia HC. Misc Application 153 of 2009, the court is unable to exercise its discretion in favour of the Exparte Applicant for reasons of his failure to adhere to the requirements of Order 53 Rule 2 of the Civil Procedure Rule which is in similar terms with section 9 of the Law Reform Act. The superior courts have held time and again that the six month period is mandatory as shown in the following Court of Appeal cases. ***Kimanzi Mboo-vs- David Mulwa C.A.C.A No. 233 of 1996 and Wilson Osolo –vs- John Ojiambo & Another eKLR***.

That for the reasons shown above the court finds that the application for leave was applied for outside the six months statutory window granted under Order 53 Rule 2 of the Civil Procedure Rule and section 9 of the Law Reform Act and therefore, the court cannot exercise its discretion in favour of the Exparte Applicant however deserving his application would otherwise be. The application is therefore dismissed with costs.

**S. M. KIBUNJA.**

**JUDGE.**

**DATED AND DELIVERED ON 5<sup>TH</sup> DAY OF NOVEMBER, 2014.**

**IN THE PRESENCE OF; Exparte Applicant, his Advocate, Mr. Jumba and Interested Party and his advocate Mr. Juma.**

**JUDGE.**