



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF BUSIA.**

**JUDICIAL REVIEW CASE NO. 22 OF 2012**

**IN THE MATTER OF THE AWARD OF MUNICIPALITY LAND DISPUTES TRIBUNAL  
BUSIA CASE NO. 8 OF 2011, DECISION OF 9.6.2011 CONCERNING LAND PARCELS NO.  
SOUTHTESO/ANGOROM/2650/359 AND BUKHAYO/BY BUGENGI/3117, 3118 & 3119.**

**AND**

**IN THE MATTER OF REPUBLIC .....APPLICANT**

**VERSUS**

**THE CHAIRMAN**

**BUSIA MUNICIPALITY LAND DISPUTE TRIBUNAL .....1<sup>ST</sup> RESPONDENT**

**THE SENIOR PRINCIPAL MAGISTRATE BUSIA.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**AULALIA WERE MIYAWA.....1<sup>ST</sup> INTERESTED PARTY**

**FLORENCE MIYAWA .....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**EXPARTE .....VINCENT OJIAMBO MAGERO.**

**R U L I N G.**

**VINCENT OJIAMBO MAGERO**, the Exparte applicant through M/s Fwaya advocate, filed the notice of motion dated 22<sup>nd</sup> June, 2012 praying for an order of certiorari against the Municipality Land dispute Tribunal decision of 9<sup>th</sup> June, 2011 relating to land parcels South Teso/Angorom/2650, 359, then Bukhayo/Bugengi/3117, 3118 and 3119 and subsequent adoption, enforcement and execution in Busia SPM C. Land case No. 63 of 2011. He also prayed for cost.

This application is based on the following grounds:

- That the tribunal lacked jurisdiction to entertain a claim of recovery of land or ownership.
- That the claim was time barred in view of section 13 of Act No. 18 of 1990 and the Limitation of actions Act Cap 22 of Laws of Kenya.
- That the proceedings and the decision contravene the principals of natural justice.

- That the tribunal was not properly constituted and that the proceedings and the decision of the tribunal is illegal and nullity.

This application is opposed by the interested party who filed grounds of opposition through M/S. Mohammed Muigai advocates on the following grounds.

- That the Municipality land dispute tribunal decision has already been revoked on appeal by the Provincial Lands Appeals Tribunal on 7<sup>th</sup> September, 2011.
- That the Provincial Land appeals tribunal decision was on 2<sup>nd</sup> February, 2012 adopted by the Senior Resident Magistrate's court in land case No.63 of 2011.

Before the exparte applicants application dated 26<sup>th</sup> June, 2012 could be heard, the interested party filed an application by notice of motion dated 25<sup>th</sup> January, 2013. It is an application under Order 2 Rule 15 (1), Order 51 Rule 1 of the Civil Procedure Rules 2010. The interested party prays for the following:

- An order to set aside and or vacate this court's order of 4<sup>th</sup> June, 2012.
- Costs of this application.

This application is based on the following grounds among others:

- That exparte applicant's application has been over taken by event as the Municipality Land Dispute Tribunal decision has been revoked by the Provincial Land Dispute Appeals Tribunal of 7<sup>th</sup> September, 2011. There is no valid decision on record capable of being called in the court and quashed.
- The decision of the Provincial Lands Dispute Tribunal which was adopted on 2<sup>nd</sup> February, 2012 in Busia SRM C. Land case No. 63 of 2011 has not been challenged by way of appeal or in any other forum.
- That the exparte applicant failed to disclose material facts to the court.

The application is opposed by the exparte applicant through their Statement of Grounds of Opposition dated 4<sup>th</sup> February, 2013 filed through his advocate on the following grounds among others:

- That these proceedings are based on the decision of Municipality Land Dispute Tribunal case No. 8 of 2011.
- That the orders of 4<sup>th</sup> June 2012, in Busia HCC. Mis. App. No.119 of 2011 were properly obtained.
- That the application 25<sup>th</sup> January, 2013 is misconceived and a clear abuse of the courts process.

On the 8<sup>th</sup> May, 2013 when the application dated 22<sup>nd</sup> June, 2012 came up for hearing, the interested party's counsel requested that their application dated 25<sup>th</sup> January, 2013 be heard together. The counsel for the exparte applicant had no objections and the court agreed that the two applications be heard at the same time and one ruling be prepared to cover the two. This ruling therefore covers the two applications described hereinabove.

During the hearing, Mr. Fwaya & Mr. Haseke advocates for the exparte applicant and the interested party respectively made their submissions in support of their respective application and in opposition of the other party's application. The court has considered their submissions, pleadings, and supporting affidavits and find as follows:

1. That the exparte applicant applied for leave to file the substantive application through their application dated 4<sup>th</sup> July, 2011. There is no disclosure by the applicant that an appeal had been filed before the Provincial Appeals Land Dispute tribunal. The leave that was granted therefore related to the decision of the Municipality Lands Disputes Tribunal and it cannot be used to challenge the decision of the Provincial Lands Disputes Appeals Tribunal of 7<sup>th</sup> September, 2011.

2. That in the application dated 25<sup>th</sup> January, 2013 a copy of the proceedings by the Provincial Lands Disputes Appeals tribunal was annexed to supporting affidavits of one Florence Miyawa, the 2<sup>nd</sup> interested party, sworn on 25<sup>th</sup> January, 2013 which clearly shows that Vincent Ojiambo Magero who is the interested party herein participated in the proceedings before the Provincial Land Disputes Appeals Tribunal. The appeals Tribunal decision among others indicated that the Busia Municipality Land Disputes Tribunal ruling in respect of land parcel South Teso/Angorom/359 had been revoked.
3. The information in 3 above was not disclosed to the court when leave to for the substantive application was granted on 4<sup>th</sup> July, 2012. The exparte applicant did not even apply to amend the statement of facts as provided for under Order 53 Rule 4 (2) of the Civil Procedure Rules to in cooperate the new development.

Under section 8 (1) of the Land Dispute Tribunal Act(now repealed) a party not satisfied by the decision of the tribunal was required to file an appeal to the appeals committee within 30 days. This appears to be what the interested party did in this particular case when they filed the appeal before the Provincial Land Disputes Appeals Tribunal. Does the decision of the Municipality land dispute tribunal therefore exists for this court to call and quash in case the exparte are successful in the application?

The answer to this question is simply that the decision of the Municipality Lands Disputes tribunal ceased to exist on 7<sup>th</sup> September, 2011 when the Provincial Land Disputes Appeals tribunal allowed the appeal and revoked that decision. The interested party, unlike the exparte applicant who took the route of Judicial review application preferred to follow the procedure set out in the relevant statute of filing an appeal. The procedure taken of coming to court for judicial review orders was not the one prescribed under section 8 (1) of the Land Dispute Tribunal Act . Where a statute has prescribed the procedure of seeking redress through an appeal a party has no option but to follow that procedure. ***The case of Republic –vs- Minister in the office of the President Provincial administration and in internal security and 2 others.*** (2013) eKLR ,Ngaah j. made the following observations.”

***“ It can safely be concluded that where a statute restricts an applicant as it does in this particular to a particular cause in challenging a decision, it is incumbent upon the applicant to take that stipulated cause.”***

The Honourable Judge after considering several decisions on the same matter, came to the following findings” **I cannot find anything that would suggest that the applicant opted for judicial review rather than an appeal because of exceptional circumstances; indeed such circumstances have not been demonstrated to exist. Neither has it been suggested in the application that the applicant preferred the judicial review route to an appeal one because the latter is less convenient, effectual, beneficial or expedient than the former. Even if the applicant was to convenience the court that the judicial review alternative is preferable for reason of convenience, efficacy, expediency, he would still have had a further hurdle to overcome; in opting for one cause rather than the other, convenience , efficacy , and expediency are attributes considered not just in the interest of the applicant alone but also taking to account the interest of the public at large.”**

The decision of the Provincial Land Appeals Disputes Tribunal is not among the documents annexed to the exparte applicant’s application and Order 53 Rule 7 (1) the applicant cannot question the validity of that decision. The decision exists and the interested party’s counsel had indicated it has already been adopted by the lower court. That decision was made on 7<sup>th</sup> September, 2011 and no party has applied for leave to apply for orders of certiorari against it. The statutory period of six months within which such an application is required to be made in accordance with Order 53 Rule 3 of Civil Procedure Rules and Section 9 (3) of the Law Reform Act chapter 22 of the Laws of Kenya. The period, having lapsed cannot be extended as was held by the Court of Appeal in the case of Wilson Osolo –vs- John Ojiambo Ochola & another.

Having found as above, it therefore follows that the application by the interested party was filed without material disclosure. Had it been disclosed to the court that the ProvincialLands Appeals Tribunal

had allowed the appeal and revoked the decision of the Municipality Land disputes tribunal at the time the application for leave was being heard the orders of 4<sup>th</sup> July, 2012 would not have been issued without the appropriate amendments being made. The Exparte applicant application is without merit and is incapable of being granted in view of the decision of the Provincial Land disputes appeals tribunal of 7<sup>th</sup> September, 2011 which is unchallenged. The converse of this is that the interested party's application of 25<sup>th</sup> January, 2013 has merit and the following orders are hereby issued:

1. That the interested party's application dated 25<sup>th</sup> January, 2013 is allowed.
2. That the Exparte applicant's application dated 22<sup>nd</sup> June, 2012 is without merit and is dismissed.
3. That the cost of this application for the interested party be paid by the exparte applicant.

It is so ordered.

**S. M. KIBUNJA.**

**JUDGE.**

**6<sup>TH</sup> JUNE, 2013.**