



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
MISC CIVIL APP. NO. 23 OF 2011

IN THE MATTER OF APPLICATION BY SAMUEL ERONI STEPHEN alias ERONI BARASA
APPLICATION BY NOTICE OF MOTION ON JUDICIAL REVIEW FOR ORDERS OF
CERTIORARI

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT (NO. 18 OF 1990)

AND

IN THE MATTER OF REGISTERED LAND ACT (CAP 300) LAWS OF KENYA

AND

IN THE MATTER OF LAW OF SUCCESSION ACT CHAPTER 160 LAWS OF KENYA

AND

IN THE MATTER OF TESO SOUTH DISTRICT LAND DISPUTES TRIBUNAL

AND IN THE MATTER OF SENIOR PRINCIPAL MAGISTRATE’S COURT LAND DISPUTE
NO 16 OF 2010 AT BUSIA

AND

IN THE MATTER OF LAND REFORM ACT CAP 26 SECTIONS 8 AND 9 (CAP 26 LAWS OF
KENYA)

BETWEEN

REPUBLIC.....
.....APPLICANT

VERSUS

CHAIRMAN TESO SOUTH DISTRICT LAND DISPUTE
TRIBUNAL.....1ST RESPONDENT

ATTORNEY GENERA.....

.....2ND RESPONDENT

PETER MAGERO

ESAMAI

DOMINIC

OSUKUKU

JOSEPH

OKISAI

ALBERT ESAMAI

KENNEDY

MAGERO

CLEOPHAS JUMA

JEREMIAH MAGERO

JOHN MAGERO

JUSTUS

MAGERO

JOAB

ONG'IRO

NICODEMUS

ESAMI

ALFRED ESAMAI

TITUS

OSUKUKU

DAVID

EKONG'

MARTIN EROTO.....

.....INTERESTED PARTIES

SAMUEL ERONI STEPHEN alias ERONI BARASA.....

.....EXPARTE APPLICANT

JUDGMENT

By Notice of Motion dated 21/10/2011 and filed on 31/10/2011, the Exparte Applicant Samuel Eroni Stephen alias Eroni Barasa, through Ms A.G.A Etyang & Co. Advocates prays for;

1. An order of Certiorari to call into this court and quash the decision/award of the Teso South District Land Disputes Tribunal made on 7/12/2010 and adopted in Busia SPMC Land case no. 16 of 2010 on 21/10/2011 and subsequent order of 24/1/2011.
2. Costs be paid by Respondents.

The application is based on 12 grounds on the face of the application the supporting affidavit of the Applicant sworn on 6th June 2011, and statement of same date. Both the supporting affidavit and statement bears two Courts date stamps of 31/10/2011 and 15/6/2011. The grounds are as summarized below;

1. That South Teso Land Dispute Tribunal in Case no 16 of 2010, on 7/12/2010 ordered that South Teso/Amukura/444, which is registered in the names of Stephen Barasa, who died on 27/6/2007, be succeeded by Peter Emai and 13 brothers through a succession cause.
2. That the said Stephen Barasa is father to the Exparte Applicant who had filed Busia HC P & A No. 25 of 2009 in relation to his father's estate.
3. That the said Peter Emai who is the 1st Interested Party has filed objection proceedings in the said succession cause and it is the High Court which should rule on who benefits from Stephen Barasa's estate comprising of South Teso/Amukura/444.
4. That the Tribunal ordered the Exparte Applicant to vacate South Teso/Amukura/444 and move to South Teso/Amukura/412, which is occupied by Elizeus Elungata, William Onyau, Remmy Okubala and others.
5. That the Tribunal lacked jurisdiction to determine the dispute for reasons that its award was ultra vires as the land was registered under Registered Land Act Cap 300 of the Laws of Kenya (Now repealed), secondly, the disputes related to ownership of the suit property and, thirdly, that by virtue of the existence of Busia HC. P & A No 254 of 2009, the dispute will be decided by the High Court.

The application is opposed by the Interested Parties through the replying affidavit sworn by Peter Magero Esamai on 23/3/2012 on behalf of himself and the other Interested Parties. Peter Magero Esamai is the 1st Interested Party and the contents of the affidavits are summarized as follows;

1. That the application is defective for failure to comply with mandatory provision of the Law.
2. That the leave to file the substantive application was obtained unprocedurally and in clear violation of the Law.
3. That these proceedings are a duplicity as the Applicant's appeal before the Provincial Appeals Tribunal was still pending.

Mr. Etyang and Onsongo for the Applicant and Interested parties respectively submitted on behalf of their clients as summarized here below;

EXPARTE APPLICANT'S COUNSELS SUBMISSIONS

1. That the suit property, South Teso/Amukura/444 was registered in the names of Stephen Barasa, now deceased, on 7/4/1997 and therefore the Tribunal did not have powers to deal with disputes on Land registered under Registered Land Act Cap 300.
2. That the Tribunal award that the Land be inherited by the Interested Parties was beyond its powers as it had no jurisdiction to deal with succession matters.
3. That the Exparte Applicant had filed a succession cause in which the 1st Interested Party had filed an objection and the Tribunal award directing the Interested Parties to file a succession cause to inherit South Teso/Amukura/444 is impracticable.
4. That this Court lacks jurisdiction to revisit the order of 13/10/2011 granting leave to file the

- substantive application as it was granted by a court of concurrent jurisdiction.
5. That Nairobi HC. Misc. Civil Application No. 666 of 2008 has no relevance as it was dealing with an application for leave to file substantive application while the instant matter is a substantive application.
 6. That the filing of the supporting affidavit does not make the application defective.
 7. That it would be a draconian move to strike out the application on technicalities while no party has shown they would be prejudiced as the issue of inheritance will be decided by the succession court.

INTERESTED PARTIES COUNSEL'S SUBMISSIONS

1. That the application for leave to file the substantive motion was defective and the substantive motion must fail as it had indicated Republic of Kenya as the Applicant while the Republic of Kenya should only be indicated as the Applicant at the substantive application stage. Counsel referred the court to pages 15 and 16 of the decision in Nairobi no. 66 of 2008.
2. That substantive application is defective by containing grounds on which it is based as if it was an application under order 51 of Civil Procedure Rules as order 53 of the Civil Procedure Rules does not require such grounds on the application or affidavit.
3. That the application is defective for being filed with a supporting affidavit to which documents are annexed. That under 53 of the Civil Procedure Rules only requires verifying affidavit to which annexures would be attached and the Statutory Statement.
4. That the Verifying affidavit does not have any annexures including the Tribunals decision and the Lower Court's adoption order and the application should therefore be struck out. Reference was made the decision in Nairobi HC. Misc Application no. 572 of 2004 at pages 6 and 8 by the Counsel to support his submission.
5. That the Tribunal's award was only an advice to the effect that the Interested Parties do file a succession cause and the award cannot be invalidated by reason of the succession cause filed by Exparte Applicant was pending.
6. That the Exparte Applicant did not serve the Interested Parties in contravention with order 53 Rule 3(3) of Civil Procedure Rules. That the Exparte Applicant is yet to file an affidavit of service giving names and addresses of the persons served with the application.
7. That there is no evidence to confirm the registered owner of South Teso/Amukura/444 is deceased.
8. That the Statutory statement and application contain different prayers.
9. That the order of the Tribunal that Exparte Applicant move to South Teso/Amukura/412 was informed by the evidence availed including that of the Exparte Applicant's brother.

The Court has carefully considered the pleadings, contents of the affidavits filed and the submissions by Counsel and find as follows;

1. That leave to file for Certiorari orders was applied for and obtained in HC Misc. Application no. 104 of 2011 on 13/10/2011. The Interested Parties Counsel has taken issue with the application for leave stating that it indicated the applicant as the Republic instead of the names of the Exparte Applicant. He submitted that as the application for leave was defective the substantive application was also defective and must fail as was decided in Nairobi HCC Misc App. No. 666 of 2008. I have carefully perused the decision in the said case and found that unlike in this matter where we are dealing with the substantive application, the case was dealing with the application for leave. Leave was rejected in that case but in this case leave has already been granted and there is no application filed to set aside the leave. In the case of **Njuguna Vs Minister for Agriculture [2007] E.EA 184**, the Court of Appeal observed per curiam that the appropriate procedure for challenging of leave which has already been granted is to apply under the inherent jurisdiction of the court, to the Judge who granted leave, to set it aside. No such application has been filed in this case and Interested Party objection fails on this ground.
2. That order 53 Rule 4 of the Civil Procedure Rules provides;

“4(1) Copies of the statement accompanying the application for leave shall be served with the

notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”.

The application in this case was accompanied with a supporting affidavit of Samwel Eroni Barasa sworn on 6/6/2011 with annexures marked SES – 1 to 6. The other documents accompanying the application is the statement also dated 6/6/2011. Both the affidavit and the statement are similar to the affidavit and statement that had been filed with the application for leave. Considering that Order 53 Rule 4(1) of Civil Procedure Rules only requires the notice of motion to be served with a copy of the statement used for the leave application, the court finds the service of the affidavit on Interested Parties without having requested for it did not cause any prejudice to their case. The provision of Order 53 of Civil Procedure Rules do not require additional affidavit to be filed with the notice of motion except in instances provided under Rule 4(2) of the said order which provides;

“(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits”.

As this court is dealing with the substantive application the only document the Exparte Applicant was obligated to file after obtaining the leave was the notice of motion. He was then to serve the motion with a copy of the statement used in the application for leave stage. The verifying affidavit had been filed at the leave application stage and as indicated in (1) above, there has been no application to challenge the leave granted. This court cannot therefore issue orders on the validity or otherwise of documents filed with an application that is not being canvassed before it. The decision in **Republic Vs Minister for Lands and Settlement & 2 Others Exparte Julius Kiboro Njogoo Mitugo** is not relevant to this case. The interested party objection on this score fails.

3. That even though the Exparte Applicant do not appear to have served the notice of motion as no affidavit of service was filed as required under Order 53 Rule 3(3) of the Civil Procedure Rule, the Interested Parties filed their replying affidavit sworn on 23rd March 2012 through their Advocate. The Interested Party’s Counsel attended court on 15/3/2013 for the first time and did not raise any complaints on service. The purpose of service is to ensure the affected parties have notice of the court processes and in this case the Interested Parties did get notice of application instructed Counsel and participated in all the court proceedings. No prejudice has been suffered by the Interested Party by the Exparte Applicants failing to file the affidavit of service and the objection on this score also fails.

4. That the South Teso Land Dispute Tribunal powers were as limited under section 3(1) of Land Disputes Tribunal Act (Now repealed) which states;

“3(1) Subject to this Act all cases of a 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 Tribunal, after hearing evidence presented before it, ordered that Land Parcel South Teso/Amukura/444 be inherited by “Peter Esamai and Other 13 brothers.....by filing a Succession in the Court of Law”.

The Interested Party’s Counsel has submitted that the Tribunal order was merely advisory.

However looking at their decision just above their order where they said, “Eroni Barasa should move away from parcel No. South Teso/Amukura/444 to South Teso/Amukura/412.....” their award was definitely meant to be more than a piece of advice. It was meant to be implemented and if the Exparte Applicant failed to take action, the Interested Party would initiate execution proceedings which would include evicting him from South Teso/Amukura/444 as their award amounted to a finding that he has no claim over the Land. The Tribunal had no power to make decision of ownership or distribution of Land registered in the names of a deceased person as that should be dealt with in accordance with the provisions of the Law of Succession Act Chapter 160 of Laws of Kenya. The Tribunal also did not have powers to determine issues of ownership of land registered under the Registered Land Act Chapter 300 of Laws of Kenya (now repealed).

5. That as shown above, the Tribunal award in respect of South Teso/Amukura/444, which is reportedly registered in the names of Stephen Barasa, and is part of the estate subject matter of Busia H.C P & A No. 254 of 2009, was in excess of the Tribunal’s jurisdiction and therefore void ab initio.

The totality of the foregoing findings shows that the Exparte Applicant has succeeded on a balance of probability to establish their case to the standard required. Their application dated 21/10/2011 and filed in court on 31/10/2011 is granted in terms of prayers 1 and 2.

S.M KIBUNJA JUDGE

Dated, Signed and Delivered on this 5TH day of NOVEMBER, 2013

In the presence of;

JUDGE