



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC MISC. APPL. NO. 109 OF 2011

JAMOCO MANAGEMENT COMMITTEE APPLICANT

VERSUS

THE CHAIRMAN, BUSIA MUNICIPALITY

LAND DISPUTES TRIBUNAL RESPONDENTS

THE HON. ATTORNEY GENERAL

AND

ALI AWALA ONG'AROI.....INTERESTED PARTY

RULING

1. The application for determination before me is a Motion on Notice dated 4/7/2018 and filed on the same date. It is brought under Sections 1A, 1B, 3A and 63(e) of Civil Procedure Act (cap 21) and Order 8 Rules 3 and 5, Order 51 Rule 1 of Civil Procedure Rules and all enabling provisions of law. The Applicant – **JAMOCO MANAGEMENT COMMITTEE** – has filed it against the Respondents – **THE CHAIRMAN, BUSIA MUNICIPALITY, LAND DISPUTES TRIBUNAL** and **THE ATTORNEY GENERAL**.

2. The application has three (3) prayers, which are as follows:

(a) That NELSON KIBE NJOROGI and MOHAMED ATHMAN OYOLO being the legal representatives of the late KANGETHE WANYOIKE and MOHAMED JUMA respectively who had been sued by the interested party at Busia Municipality Land Disputes Tribunal in respect of the award under review herein be enjoined in the Judicial Review proceedings commenced herein as the respective 2nd and 3rd exparte Applicants.

(b) That the Applicant be granted leave to amend the title of the proceedings, the chamber summons for leave to apply for Judicial Review and the statement of facts and swear a fresh verifying affidavit as per the annexed drafts.

(c) That costs of this application be provided for.

3. The application is anchored on the grounds, *inter alia*, that the late Kangethe Wanyoike and Mohamed Juma were sued before the Busia Municipality Land Disputes Tribunal when they were already dead. But the proceedings were conducted against them as if they were alive and without any satisfaction as to whether they had been served and these proceedings ended with adverse award by the tribunal against their estates; that the Applicants have recently petitioned for and obtained limited grants ad Litem to represent the two said estates in the proceedings herein; that the orders sought are necessary to give a chance to the estates of the two deceased persons, who were condemned unheard, to contest the award and for fair determination of all issues; and, finally that since the proceedings are still at the Exparte stage the interested party will not suffer prejudice if the application is allowed.

4. The application came with a supporting affidavit wherein it is deposed, *inter alia*, that the proceedings herein were commenced by JAMIA MOSQUE COMMUNITY who have a mosque erected on the parcel of land that was granted to the interested party by the tribunal proceedings filed in the year 2009 long after the successive deceased proprietors had passed on. The deceased were said to have been condemned unheard and it was deposed that it is only fair that their legal representatives be enjoined in the case to represent the interests of the deceased.

5. There is no interested party's name in the chamber summons sought to be amended or in this application itself but in the draft amended

chamber summons annexed to the application, one ALI AWALA ONG'AROI is named as one. This is the party who responded to the application. And he did so vide grounds of opposition filed on 27/11/2018 and a replying affidavit filed on 10/12/2018. It is clear that this is the party who had taken the matter to BUSIA MUNICIPALITY LAND DISPUTE TRIBUNAL. He is the one accused of filing the matter against deceased persons.

6. According to the proposed interested party, the application herein is without merit and should therefore be dismissed with costs. The application is said to be *RES JUDICATA* as a similar application had been made in the lower court in BUSIA CMCC No. 5/2011 and dismissed with costs. The dismissal led to filing of appeal by the Applicants herein. The application is also said to have been overtaken by events as the interested party has already acted on the orders of the Land Dispute's Tribunal.

7. The application was canvassed by way of written submissions. The Applicants submissions were filed on 11/1/2019. It was pointed out that the interested party sued deceased parties before the Land Dispute's Tribunal and was heard and granted orders without the tribunal even bothering to find out whether the sued parties had been served. The tribunal proceedings were instituted in the year 2009 yet the parties sued had died in 1999 and 2002. It was submitted that it is now necessary to enjoin the legal representatives of the estates of the parties initially sued before the land tribunal. The Applicants are the legal representatives and the proceedings herein seek to challenge the proceedings and/or orders of the Land Dispute's Tribunal.

8. The application sought to be amended was said to have shortcomings and require looking into in order to effect rectification. It was submitted that it is the inherent duty of the court to do justice by hearing both sides to the dispute in order to make an informed decision. Further, the Applicants denied the allegation by the interested party that the application here is *RES JUDICATA*. The interested party was faulted for not showing this court that the lower court was dealing with the same subject matter as the proceedings herein. He was said not to have shown the court how the ruling of the lower court can apply to an application for judicial review in this court. The ruling of the lower court was said not to have been availed to this court and it would therefore be difficult to hold that the lower court had properly ruled on the matter. More specifically, it was submitted that the lower court was not dealing with an application for judicial review. This court was urged to allow the application.

9. The proposed interested party's submissions were filed on 21/1/2019. It was submitted, *inter alia*, that **"The issues raised in the said application have already been canvassed in the lower court and a decision arrived at"**. It was also submitted that **"the application herein is overtaken by events as the interested party has extracted an order in the lower court in BUSIA CMCC Land Case No. 5 of 2011 and served such order upon the Land Registrar, who has acted on the same ..."** The court was urged to dismiss the application herein with costs.

10. In the main, the interested party opposes the application because in his view, the lower court had handled a similar application and dismissed it. To him, the application herein is *RES JUDICATA*. But the Applicant's faulted him on this issue for not availing the ruling of the lower court here and for failing to appreciate that the lower court was not handling judicial review proceedings as is the case here.

11. The parties dispute relate to Land parcel No. SOUTH TESO/ANGOROMO/957 and records availed by the Applicants show that the parties sued by the interested parties before the Land Disputes Tribunal were long dead before they were sued. Given this apparent state of affairs, it would appear to me that the interests of justice would be better served by allowing this application.

12. I also agree with the Applicants in their observation regarding the manner the interested party has handled the issue of *RES JUDICATA*. Curiously, the interested party did not avail the ruling of the lower court. It is from that ruling that this court would understand better the issues that were canvassed and considered and whether they are the same issues obtaining in this application. The issue of *RES JUDICATA* is about a claim or issues decided upon. You cannot convince a court of law about such claim or issues without availing the decision issued by the court. It was a serious omission on the part of the interested party to fail to avail the ruling of the lower court.

13. Besides, what we have here are judicial review proceedings. It is trite that the lower court does not have jurisdiction to handle judicial review proceedings. In what context then can the ruling of the lower court in proceedings of a nature different from the proceedings herein be said to be *RES JUDICATA* concerning the matter at hand? I think the interested party does not appreciate well what *RES JUDICATA* is all about.

14. I have also looked at the Chamber Summons sought to be amended. The counsel on record when it was filed is different from the one now on record. It is clear to me that it needs to be amended. The interested party for instance is not named as a party in the intended judicial review proceedings yet it is absolutely necessary that he be made one.

15. It is in light of the foregoing that it becomes necessary to allow the application herein. It is hereby allowed but costs of the application are awarded to the interested party.

Dated, signed and delivered at Busia this 12th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

1st Respondent: Absent

2nd Respondent: Absent

3rd Respondent: Absent

Interested Party: Absent

Counsel for the Applicant: Present

Counsel for the Respondents: Absent

Counsel for the Interested Party: Present

Court Assistant: Nelson Odame