



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
MISC. APPL. NO. 215 OF 2013

REPUBLIC PLAINTIFF

VERSUS

BUSIA MUNICIPALITY LAND DISPUTE TRIBUNAL.....1ST DEFENDANT

WILLIAM MUNYEKENYE OTIENGI2ND DEFENDANT

R U L I N G

1. The application before me is a Notice of Motion dated 11/12/2013 filed here on 19/12/2013. It is expressed to be brought under Order L111 (sic) Rule 3 of Civil Procedure Rules and Sections 3 and 3A of Civil Procedure Act (cap 21). The Exparte Applicant – **WILLIAM CHARLES ADERA** – brought it against the Respondent – **BUSIA MUNICIPALITY LAND DISPUTES TRIBUNAL** – and the Interested Party – **WILLIAM MUNYEKENYE OTIENGI**. The application has three prayers. The prayers are as follows.

Prayer 1: That this honourable court do grant leave to **WILLIAM CHARLES ADERA** to enable him to file a motion seeking for orders of CERTIORARI with a view to quashing the award/decision made by **BUSIA MUNICIPALITY LAND DISPUTES TRIBUNAL** and adopted in court at **BUSIA** in CM Land case No. 133 of 2009.

Prayer 2: That such leave if granted do operate as an order of stay of execution of the tribunal decision as adopted by the Resident Magistrate on 30/9/2013.

Prayer 3: That costs be provided for.

2. According to the Exparte Applicant, the tribunal acted ultra-vires by ordering the surveyor to visit his land. To him, the tribunal purported to be dealing with issues not provided for by law. The dispute is said to have been about a boundary and according to the Exparte Applicant, the tribunal should have called for a surveyors report first as allegedly provided for under Sections 21 and 22 of the now repealed Registered Land Act (cap 300). Another allegation is that the Exparte Applicant was not given notice to appear at the tribunal during it sittings.

3. The legal tussle according to the Exparte Applicant revolves around two land parcels and is about boundary. The two land parcels are L.R. SOUTH TESO/ANGOROMO/2739 and 2740. But records in the court file seem to contextualize the tussle as between the original L.R. SOUTH TESO/ANGOROO/565 (now divided into L.R. SOUTH TESO/ANGOROMO/2739 and 2740) and L.R. SOUTH

TESO/ANGOROMO 566. Between the original parcels Nos 565 and 566 was a road leading to a river. That road also marked the boundaries between the two parcels. The Exparte Applicant is said to have blocked a portion or section of the road thereby denying the Interested Party access to the river. This in essence formed the gist of the Interested Party's complaint against the Exparte Applicant at the land tribunal.

4. The tribunal on its part ordered that the government surveyor determine the boundary and open the road up to the river. The Exparte Applicant was ordered to pay survey charges as he is the one who had interfered with the boundary. Records show that the lower court here at Busia adopted the tribunal's decision on 21/1/2009. The Exparte Applicant's position however is that there is a court decision adopting the tribunals decision on 30/9/2013. The order arising from that alleged decision is the one being challenged.

5. The Interested Party responded vide a replying affidavit filed on 6/5/2017. To the Interested Party, the application herein is frivolous and is an abuse of the court process. The order sought is said to have been overtaken by events. The application is also said to have been filed out of time. The Exparte Applicant is accused of interfering with the boundary.

6. The application was canvassed by way of written submissions. The Exparte Applicant's submissions were filed on 6/12/2017. According to him, the tribunal lacked jurisdiction to hear and determine the matter. The Interested Party's submissions were filed on 22/12/2017. According to the Interested Party, the allegation that the tribunal award was adopted by the court on 30/9/2013 is misleading. The award, submitted the Interested Party, was adopted on 20/1/2009. The decision of 30/9/2013 related to execution and it came after the surveyor had visited the land as directed in the order of adoption of the award made on 21/1/2009.

7. The Interested Party submitted also that the tribunal did not act ultra-vires. The matter before it related to boundary and was within its legal mandate as stipulated in Section 3(1)(a) of the now repealed Land Dispute's Tribunal Act (cap 303A). It also related to trespass which is also mandated under sub-section C of the same provision. It was wrong, submitted the Interested Party, to assume that sections 21 and 22 of Registered Land Act (cap 300) applied.

8. Some shortcomings were also pointed out relating to the application as filed. Order L111, for instance, is said not to exist. Then the Exparte Applicant filed supporting affidavit, which is not provided for, and proceeded to put back-up evidence in that affidavit instead of doing that in a verifying affidavit.

9. I have considered the application, the response made, and the rival submissions. I am in general agreement with the Interested Party both in his appreciation of the facts and exposition of the law. First what the Exparte Applicant calls adoption of tribunal's award on 30/9/2013 is actually not an adoption. The adoption had been done earlier by the court on 21/1/2009. During that adoption the surveyor was directed to visit the site. That visit was done on 4/7/2011 and the surveyor wrote a letter to court concerning it on 15/11/2011. The order of 30/9/2013 actually captures almost verbatim the contents of that letter. The order is in essence an endorsement of the execution carried pursuant to the earlier adoption by the court done on 21/1/2009. The Exparte Applicant is therefore wrong to purport that the order of 30/9/2013 adopts the tribunal award.

10. Second, the matter is essentially about trespass and boundary. The tribunal was mandated to handle such matter under Section 3(1) of the now repealed Land Dispute's Tribunals Act. It is wrong for the Exparte Applicant to assume that the tribunal was bound by Sections 21 and 22 of the repealed Registered Land Act (cap 300). It had jurisdiction *prima facie* to do what it did.

11. Third, it is true there is no order L111 in Civil Procedure Rules. There is also no provision for a supporting affidavit. Besides, the Exparte Applicant purports to avail annexures WCA 1(a) and WCA 1(b) but actually fails to avail them. Overall, the application is a jumbled piece. It is wanting in its legal premise and its factual foundation is incorrect. It seems clear to me that proceedings based on it would be futile.

12. Judicial Review orders are discretionary remedies. Given what was availed to me, I would not exercise discretion in Exparte Applicant's favour. I dismiss the application herein with costs to the Interested Party. The possibility of success seems remote or non-existent.

Dated, signed and delivered at Busia this 28th day of February, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendants:

Counsel of Plaintiff:

Counsel of Defendants: