



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

JUDICIAL REVIEW NO. 3 OF 2017

REPUBLIC.....APPLICANT

VERSUS

BUSIA MUNICIPALITY LAND DISPUTES TRIBUNAL..RESPONDENT

AND

RISPA ACHIENO WANYAMA.....INTERESTED PARTY

ABSALOM NAMANI WASIKE

CHARLES WANDERA OUNDO.....EXPARTE APPLICANTS

JUDGEMENT

1. This is a judicial review matter filed essentially to challenge the decision of the Respondent – **BUSIA MUNICIPALITY LAND DISPUTE’S TRIBUNAL** – made in favour of the Interested Party – **RISPA ACHIENO WANYAMA** – on 6/1/2011 and adopted as judgement of Resident Magistrate’s Court, Busia, on 9/3/2011. The Exparte Applicants – **ABSALOM NAMANI WASIKE** and **CHARLES WANDERA OUNDO** – felt aggrieved and instituted this matter. At this stage however, CHARLES WANDERA OUNDO is seized of the matter alone both as holder of a power of attorney from ABSALOM NAMANI WASIKE and also as a legal representative of his late father – JUSTO OUNDO OKUMU.

2. The dispute before the tribunal related to ownership of land parcel Nos BUKHAYO/MUNDIKA/6271 and BUKHAYO/MUNDIKA/6273 (“disputed parcels” hereafter) parts of which the Interested Party laid claim to ownership before the tribunal. The Exparte Applicants challenged the decision for reasons that the tribunal had no jurisdiction to make the decision; some tribunal members failed or neglected to sign the decision; the Interested Party lacked capacity to mount the dispute, as she had no letters of administration yet she was claiming ownership as widow or representative of her late husband; there was possible bias as one member, PATRICK MULLAH, was Interested Party’s son-in-law, and finally that the claim before the tribunal was caught up by the statute of limitation. The disputed parcels were also said to fall within Busia Municipality and were therefore within an area over which the tribunal had no physical jurisdiction.

3. The prayers sought are as follows:

Prayer (a): That an order of CERTIORARI be issued directed at the Respondents, their agents, servants and all persons claiming to act through them calling into the Environment and Land Court the proceedings and award of BUSIA MUNICIPALITY LAND DISPUTE’S TRIBUNAL adopted as judgement of the lower court vide BUSIA PM LD No. 13 of 2011 and quashing the same.

Prayer (b): That the costs of the application be provided for.

4. The Interested Party responded to the matter vide a replying affidavit filed on 26/6/2018. To the Interested Party, the matter is meant to embarrass her as well as deny her the right to inherit the assets of her late husband. The Exparte Applicants were said to be intent on delaying the matter as the tribunal conducted its proceedings openly and none of them raised the issue they are now raising. She denied that her late husband hailed from an area called Muyafwa as alleged by the Exparte Applicants.

5. It was the Interested Party’s position that the Exparte Applicants should not raise the issue of lack of letters of administration on her part since the fact of bringing her to court shows they recognize her as the right beneficiary of her late husband’s estate. She pointed out that the court should have regard to merits, not technicalities.

6. The matter was heard by the court on 16/7/2018 and Wanyama for the Exparte Applicants amplified and reiterated what is already contained in the matter. The Interested Party gave a response and averred, *interalia*, that the disputed parcels belonged to her late husband. That is the only place she calls home, she said, and the tribunal decided the matter properly.

7. The Exparte Applicants replied to the Interested Party saying, *interalia*, that her address to the court was outside the matters contained in her replying affidavit and that she still had a right to urge the merits of her claim at the proper forum even if she loses this matter.

8. I have considered the application herein, the response made, and the rival arguments. In judicial review matters, courts of law are not concerned with the merits of the decisions being challenged. The focus normally is on legality of procedure and/or compliance with substantive law. The Interested Party seems to be focused on merits. She is wrong. In judicial review, it does not work that way.

9. The powers of the tribunal that made the decision being challenged were contained in the now repealed Land Dispute's Tribunal Act at Section 3. And it is clear from that provision that the tribunal had powers to handle matters of trespass, claim to work or occupy land including land held in common, and subdivision of, or disputes related to, boundaries of land. It is clear from the provision that the tribunal had no mandate at all to decide on issues relating to ownership. To the extent therefore that the tribunal purported to confer rights of ownership to the Interested Party, then it went beyond its jurisdiction.

10. It is also true that if the Interested Party was urging her claim before the tribunal as representative of her late husband's estate, then it is obvious that she needed to have the requisite grant to do so arising from succession proceedings. If she did not have it, the law is clear that she could not urge the claim before any legal forum. And if one of the tribunal members was her son in law, again the possibility of bias was real and the Exparte Applicants were right to apprehend real or perceived miscarriage of justice.

11. There were other issues raised but I do not deem it necessary to go into them. Suffice it to say that the issue of ownership alone is enough to warrant the grant of an order of CERTIORARI. And I agree with the counsel for the Exparte Applicant that the Interested Party can still ventilate the merits of her claim before the appropriate forum. That is the way to go.

12. Without much ado therefore, I allow this matter in terms of prayer (a). As regards costs, which is prayer (b), I realise that the parties are related. The Interested Party in particular impressed me as rustic rural woman of humble means. I therefore order and direct that each side should bear its own costs.

Dated, signed and delivered at Busia this 26th day of September, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant:

Respondent:

Interested Party:

Counsel of Applicant:

Counsel of Respondent: