



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**HC MISC. APPLICATION NO. 42 OF 2010 (J.R)**

**IN THE MATTER OF AN APPLICATION FOR**

**JUDICIAL REVIEW FOR ORDERS OF CERTIORARI**

**AND**

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

**IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES**

**IN THE MATTER OF LAND REFERENCE NO. KERICHO/SILBWET 1745**

**IN THE MATTER OF BOMET CENTRAL DIVISION LAND DISPUTES TRIBUNAL**

**IN THE MATTER OF KERICHO CHIEF MAGISTRATES**

**MISCELLANEOUS APPLICATION NO. 87 OF 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**BOMET CENTRAL DIVISION**

**LAND DISPUTES TRIBUNAL.....1ST RESPONDENT**

**KERICHO CHIEF MAGISTRATE.....2ND RESPONDENT**

**WILSON LASOI.....SUBJECT**

**RULING**

**Introduction**

1. What is before me is an application dated 21<sup>st</sup> December 2010 for Judicial Review brought under Order 53 Rule 1(2) and 3(1) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The said

application seeks orders of certiorari removing unto this court for purposes of being quashed the decision of Bomet Central Division Land Disputes Tribunal award dated 22<sup>nd</sup> September 2010 which was adopted as a judgment of the Court on 18<sup>th</sup> October 2010 in Kericho CMC Miscellaneous Application No. 87 of 2010.

2. The application is based on the Statutory statement and the Verifying Affidavit of Wilson Lasoi sworn on the 14<sup>th</sup> December 2010. The application is made pursuant to the Ruling of the court dated 15<sup>th</sup> December 2010 in which the court granted leave to the Applicant to apply for certiorari to remove unto this court for quashing the decision of the in Kericho CMC Miscellaneous Application No. 87 of 2010. accordance with Order 53 Rule 1 of the Civil Procedure Rules.

3. The main grounds for the application are as follows;

*Firstly that the Applicant purchased land parcel no KERICHO/SILIBWET/1745 measuring 1 acre and has been in exclusive occupation thereof since 1997.*

*Secondly, the Tribunal had no jurisdiction to determine a matter touching on title to land.*

*Thirdly, the Applicant was not given a fair hearing and a chance to adduce sufficient evidence*

*Fourthly, the award of the Tribunal which was adopted as a judgment of the Court vide Kericho CM Miscellaneous Application No. 87 of 2010 was irregular and ultra vires ab initio and is incapable of implementation as the suit property is fully and legally owned by the applicant.*

4. The application was opposed by the 3<sup>rd</sup> Respondent through her Replying Affidavit sworn on 23<sup>rd</sup> April 2012 in which he depones that the award of the Tribunal was merely an opinion and/or suggestion advising the parties on the position of the suit land and what ought to have been done and not an adjudication on ownership as it did not excise, demarcate or transfer the suit land.

5. She depones that the award is not ultra vires as it did not transfer or bestow ownership upon the Respondent but only clarified the history of the suit land.

6. She further depones that in 1997 she sold 50 ft by 100ft to the Applicant at an agreed purchase price of Kshs. 160,000 but due to her ill health he took advantage and expanded his portion to one acre. In the meantime, the applicant did not finish paying the purchase price.

7. She maintains that the dispute between her and the applicant is boundary dispute which was rightfully within the jurisdiction of the Tribunal. She depones that the judgment arising out of the award is unenforceable in law as it was merely advisory and not binding on the parties, therefore the applicant could not have been aggrieved by it.

8. She states that the entire motion is misplaced and contravenes the provisions of the Civil Procedure Rules as the Applicant ought to have filed a fresh suit after leave was granted by the Court.

9. In his submissions, learned counsel for the Applicant has submitted that the applicant is aggrieved not by the award or judgment but by the process which was followed by the Tribunal. He has relied on the case of **Municipal Council of Mombasa V Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001** where the Court held as follows:

*“Judicial Review is concerned with the decision making process, not the merits of the decision itself: the court would concern itself with issues such as whether the decision-maker had jurisdiction, whether the persons affected were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself, such as whether there was or there was*

*sufficient evidence to support the decision.*

10. He further relied on the case of **Pastoli V Kabale District Local Government Council and Others (2008) E.A 2 EA 300**. In that case the Court cited with approval the case of **Council of Civil Unions V Minister for Civil Service (1985) AC 2** and **An Application by Bukoba Gymkhana Club (1963) EA 478 at 479** and held as follows:

*“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. It is for example an illegality where the Chief Administrative officer of a District interdicts a Public Servant on the direction of the District Executive Committee when the powers to do so are vested in the District Service Commission.*

*Irrationality is when is there is such unreasonableness in the decision taken or act done that, no reasonable authority addressing itself to the facts and the law would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.*

*Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of Natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”*

11. In the instant case the applicant has complained that he was not given a fair opportunity to present his case before the decision was made. Furthermore, he has challenged the jurisdiction of the Tribunal to adjudicate upon matters touching on title to land.

12. It is my finding therefore that the decision was tainted with illegality.

13. The 3rd Respondent has criticized the manner in which the suit was commenced. This is a procedural technicality which does not go to the substance of the suit. I am guided by Article 159 (2) (d) of the Constitution of Kenya 2010 which enjoins the court to administer justice without undue regard to procedural technicalities.

14. Accordingly, I allow the application and make the following orders:

a) That an order of certiorari is hereby issued removing unto this court for purposes of being quashed and quashing the decision of Bomet Central Division Land Disputes Tribunal award dated 22<sup>nd</sup> September 2010 which was adopted as a judgment of the Court on 18<sup>th</sup> October 2010 in Kericho CMC Miscellaneous Application No. 87 of 2010.

b) The costs of this application shall be borne by the Respondents.

**Dated, signed and delivered at Kericho this 20<sup>th</sup> day of June, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Koko for the Applicant

2. N/A for the Respondent

3. Court Assistant – Rotich