



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW APPLICATION NO. 39 OF 2011

**IN THE MATTER OF AN APPLICATION BY AGNES BICHANGA FOR JUDICIAL REVIEW
IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF KEUMBU LAND DISPUTES TRIBUNAL(KISII CENTRAL DISTRICT),
CASE NO. 7 OF 2004**

AND

**IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KEROKA,
MISC. CIVIL APPL.NO.33 OF 2010**

BETWEEN

**REPUBLIC.....
.....APPLICANT**

VERSUS

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

**THE SENIOR RESIDENT MAGISTRATE'S COURT AT KEROKA2ND
RESPONDENT**

**THE ATTORNEY GENERAL.....3RD
RESPONDENT**

AND

**JOHNSON ARANGA ANGWENYI.....INTERESTED
PARTY**

EXPARTE

AGNES BICHANGA

JUDGMENT

1. What is before me is the application by the ex parte applicant, **Agnes Bichanga** (hereinafter referred to only as “**the applicant**”) dated 4th May, 2011 seeking; an order of certiorari to remove into this court and quash the 1st respondent’s undated award made in Case No. 7 of 2004 and an order of prohibition to prohibit the 1st and 2nd respondents and the interested party from executing the said award by the 1st respondent that was adopted as a judgment of the court on 15th December, 2010. The application was supported by the supporting affidavit of the applicant sworn on 19th April, 2011 and the statutory Statement of the same date which were filed pursuant to the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. The facts giving rise to the application can be summarized from the contents of the said affidavit and the statement as follows; at all material times, the applicant was in occupation of all that parcel of land known as **LR. No. Nyaribari Chache/Nyanturago/894** (“**the suit property**”) which was and is still registered in the name of the interested party as the owner thereof. Sometimes in the month of May, 2010 or thereabouts, the interested party lodged a complaint against the applicant with the 1st respondent seeking the assistance of the 1st respondent to compel the applicant to vacate the suit property. The 1st respondent heard the interested party’s complaint and made a decision on the same on a date which is not clear from the record. In its decision, the 1st respondent ordered the applicant to vacate the suit property and the District Officer of Keumbu Division to provide security during the applicant’s eviction from the suit property. The 1st respondent’s decision aforesaid was lodged with the 2nd respondent for adoption as a judgment of the court. The 2nd respondent adopted the same as a judgment of the court on 15th December, 2010 and a decree of the same date was issued for execution.
2. In the present application, the applicant has challenged the 1st respondent’s decision aforesaid and its adoption by the 2nd respondent on several grounds. The applicant has contended that the 1st respondent had no jurisdiction to determine the dispute that existed between the interested party and the applicant as it concerned the ownership of and/or title to the suit property. The applicant contended further that the 1st respondent had no jurisdiction to entertain a dispute over land registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). The 1st respondent contended further that the 1st respondent had no jurisdiction to make an order for the eviction of the applicant and that the 1st respondent’s decision was against the rules of natural justice. The applicant claimed that she was never afforded an opportunity to defend herself before the 1st respondent. The applicant contended further that the 1st respondent’s decision had no basis and contravened the provisions of section 7 (1) and (2) of the Land Disputes Act, 1990 (now repealed).
3. The application was not opposed by the respondents. The same was however opposed by the interested party, who filed a replying affidavit sworn on 27th September, 2012. The interested party’s response to the applicant’s application was straight forward. The interested party deposed in his affidavit that he is the registered proprietor of the suit property and that for some time the applicant and members of her family have been interfering with the interested party’s quiet enjoyment of the suit property by trespassing thereon. As a result of this interference, the interested party filed a civil suit in the High Court against the applicant namely, Kisii HCCC No. 130 of 2006 (hereinafter referred to only as “**the High Court**”) for the eviction of the applicant from the suit property. On 22nd March, 2012, the High Court by consent of both parties referred the dispute between the interested party and the applicant to the 1st respondent herein for determination in accordance with the provisions of the Land Disputes Act, 1990 (now repealed). Following this order by the High Court, the interested party lodged his claim against the applicant with the 1st respondent who heard and determined the same. The 1st respondent’s decision was lodged with the 2nd respondent who proceeded to adopt the same as a judgment of the court. The interested party annexed to his affidavit; a copy of certificate of official search dated 12th September, 2012 in respect of the suit property which shows that the interested party was registered as the proprietor of the suit property on 14th November, 2002, a copy of the court order made in the High Court case on 22nd March, 2010 referring the dispute between the interested party and the applicant to the 1st respondent for determination, a copy of the 1st respondents

decision, a copy of the proceedings and decree of the 2nd respondent arising from the adoption of the 1st respondent's decision aforesaid.

4. On 17th April, 2013, the advocates for the parties agreed to argue the application herein by way of written submissions. The applicant filed her written submissions on 25th September, 2013 while the interested party filed his written submissions on 14th May, 2013. I have considered the applicant's application, the statutory statement and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the interested party in opposition to the application and the written submissions filed by the advocates for the applicant and advocates for the interested party. The issues that present themselves for determination in this application in my view are; (i) **Whether the 1st respondent had jurisdiction to determine the dispute that existed between the applicant and the interested party over the suit property, (ii) Whether the decision of the 1st respondent was arrived at contrary to the rules of natural justice, (iii) Whether the 2nd respondent had jurisdiction to adopt the decision of the 1st respondent as a judgment of the court and lastly, (iii) whether the applicant is entitled to the orders sought.**
5. The applicant has not denied that the interested party had filed a suit in the High Court (“**the High Court**”) seeking her eviction from the suit property. The applicant has acknowledged this case in her statutory statement dated 19th April, 2011. The applicant did not swear any affidavit to controvert the averments contained in the interested party's affidavit in opposition to the application herein. The interested party's contention that the High Court did refer by consent of the parties the dispute between the applicant and the interested party to the 1st respondent for determination is therefore not denied. The interested party has in fact exhibited a copy of the court order made in the High Court case referring the matter to the 1st respondent. It is after this reference by the High Court that the 1st respondent proceeded to hear and determine the dispute. I am of the opinion that the applicant having agreed to have the dispute that she had with the interested party over the suit property referred to the 1st respondent for determination, it is not open to the applicant now to challenge the jurisdiction of the 1st respondent. As much as I am aware that the parties cannot confer jurisdiction upon a court or a tribunal by consent, the applicant is bound by the consent order that was made in the High Court case referring the dispute to the 1st respondent. If for any reason, the applicant felt after it had entered into the said consent that the 1st respondent did not have the requisite jurisdiction to determine the dispute, the applicant should have moved the High Court to set aside or vary the said order. This court cannot sit on appeal against the decision of the High Court. It can review such a decision but only on a proper application. If this court was to hold that the 1st respondent had no jurisdiction to determine the dispute between the interested party and the applicant, such decision would in effect amount to setting aside the High Court order aforesaid without a proper application having been made for that purpose. I hold the view that this is not the proper forum to review or set aside the said High Court order. The applicant is bound by the same and cannot bring the same into question in these proceedings. In any event, the High Court had power under the provisions of rule 8 of The Land Disputes Tribunals (Forms and Procedure) Rules, 1993(now repealed) to refer the matter to the tribunal for determination in accordance with the provisions of the Land Disputes Tribunals Act, 1990(now repealed). The High Court order aforesaid was to that effect. Again as submitted by the interested party, the dispute between the interested party and the applicant concerned the issue of trespass which I believe the 1st respondent had jurisdiction to determine under section 3 (1) (c) of the said Act irrespective whether the land the subject of the dispute was registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) or not. As to whether the 1st respondent had jurisdiction to determine disputes over land registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed), refer to the definition of land in section 2 of the Land Disputes Tribunals Act, 1990, which defines land as “agricultural land as defined in section 2 of the Land Control Act, **whether or not registered under the Registered Land Act.... (emphasis mine)**”. What I have said is enough to show that the 1st respondent had jurisdiction to determine the dispute that was referred to it by the interested party pursuant to the High Court order aforesaid. The decision of the 1st respondent having been arrived at with jurisdiction, the same was lawful and as such it was equally lawful and proper for the 2nd respondent to adopt the

