



No. 2792

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

JUDICIAL REVIEW CIVIL APP. NO. 88 OF 2010

IN THE MATTER OF: APPLICATION BY YUVENALIS MOSIOMA MIRORO FOR  
JUDICIAL REVIEW

(CERTIORARI & PROHIBITATION)

AND

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

AND

IN THE MATTER OF: KISII MUNICIPALITY LAND DISPUTES TRIBUNAL  
(KISII CENTRAL DISTRICT)

AND

IN THE MATTER OF: CHIEF MAGISTRATE'S COURT AT KISII

AND

IN THE MATTER OF: KISII CMCC MISC. APPLICATION NO. 120 OF 2010

AND

**IN THE MATTER OF: KISII MUNICIPALITY LAND DISPUTES TRIBUNAL NO. 14 OF 2010**

BETWEEN

REPUBLIC.....APPLICANT

ANT

VERSUS

KISII MUNICIPALITY LAND DISPUTES TRIBUNAL KISII CENTRAL DISTRICT.....1<sup>ST</sup>

RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KISII.....2<sup>ND</sup>

RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup>

RESPONDENT

AND

MICHIRA OTUKE.....INTERESTED

PARTY

AND

YUVENALIS MOSIOMA MIRORO.....EX-PARTE

APPLICANT

**RULING**

These Judicial Review proceedings were commenced pursuant to the leave granted to the applicant, **Yuvenalis Mosioma Miroro**, on 29<sup>th</sup> November, 2010. In the application for leave to commence the instant proceedings, the applicant sought leave to apply for an order of certiorari to remove into this court for purposes of quashing the decision of the 1<sup>st</sup> respondent, **Kisii Municipality Land Disputes Tribunal** dated 10<sup>th</sup> September, 2010 and the ensuing judgment dated 15<sup>th</sup> November, 2010, an order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> respondent and the interested party, **Michira Otuke** from implementing the orders made by the 1<sup>st</sup> respondent on 10<sup>th</sup> September, 2010. The applicant also prayed for costs of the proceedings.

Pursuant to the leave granted as aforesaid the applicant filed the instant substantive Notice of motion. Essentially, the history of this dispute appears to be that **Michira Otuke**, the interested party sold to the applicant a plot measuring 50ft X 100ft in the year 1998 at a consideration of Kshs.50,000/= . However, he later discovered that the applicant got a bigger portion than what he had sold him. He approached him and asked him to pay for the extra portion but the applicant refused, hence the claim before the 1<sup>st</sup> respondent.

The case for the applicant before the 1<sup>st</sup> respondent was that yes, he bought from the interested party a portion of land measuring 50ft X 100ft. He later requested the interested party to sell him the remaining small portion at Ksh.30,000/= and the interested party agreed.

The 1<sup>st</sup> respondent having carefully listened to the dispute reached the conclusion that:

**“... FINDINGS**

- 1. The tribunal has found that the objector took the advantage of the Claimant's ignorance and got the extra portion without paying for it.**
- 2. That the tribunal has further found that the objector's allegation in that he gave the Claimant building materials worth Ksh.24,000/- plus Kshs.6,000/- cash is false. If it is true where is the evidence to that effect nor did he call any witness to testify that it is true the materials were given to the Claimant.**
- 3. That there is no evidence that both parties appeared before land control board. The objector got the Land Title through his own means.**

**DECISION**

**After having heard and considered the representations from both parties and their witnesses, we hereby decide that:-**

- 1. The tribunal has concurred with the objector's admission of reverting the extra portion to the claimant.**
- 2. That the Kisii District Surveyor to visit Parcel No. Central Kitutu/Mwabundusi/1420 and curve out a portion measuring 50ft X 100ft for the objector Yuvinalis Mosioma Miroro as indicated on our second sketch plan and the extra portion which is letter "A" reverted to the Claimant Mzee Michira Otuke.**
- 3. That any plants falling under portion "A" the objector Mzee Yuvinalis Mosioma Miroro to remove them within 3 months.**
- 4. That the objector to transfer portion "A" to the claimant MICHIRA OTUKE and if he fails to do so, the executive officer of the court to effect the transfer.**
- 5. Both parties to share the costs for survey and transfer of title deeds' fees...".**

From the foregoing it is quite clear that the 1<sup>st</sup> respondent exceeded its jurisdiction as conferred by the provisions of section 3(1) of the **Land Dispute Tribunals Act**. The 1<sup>st</sup> respondent has no jurisdiction to order a re-survey of the parcel of land. In effect again, the 1<sup>st</sup> respondent interfered with the title to land which it had no jurisdiction bearing in mind, the provisions of section 27 and 28 of the **Registered Land Act**. It lacked jurisdiction to order the transfer of a portion land registered in the name of another person to another. From the proceedings, it is abundantly clear that the land in dispute is registered in the names of the applicant. I therefore have no hesitation whatsoever in holding that the award of the 1<sup>st</sup> respondent

dated 10<sup>th</sup> September, 2010 contravened the mandatory provisions of section 3(1) of the **Land Disputes Tribunals Act** and ought to be quashed on the ground that it was made in excess of or want of jurisdiction. It is therefore nullity. The applicant being the registered owner of the land, his title can only be impeached vide section 143 of the **Registered Land Act** and not otherwise.

The interested party no doubt from his written submissions appreciates the fact that the award was made without jurisdiction. However, he has sought to justify the same on technicalities. Out of nothing comes nothing. That maxim holds in the circumstances of this case.

The 1<sup>st</sup> technical point raised by the interested party is that upon the adoption of the award by the 2<sup>nd</sup> respondent, the Chief Magistrate's Court, Kisii the said award ceased to exist as a decision capable of being quashed and or addressed. Indeed that was the holding of **Khamoni J in Wamwea V Catholic Diocese of Muranga (2003) KLR 389**. I entirely agree with that proposition. Had the applicant sought only to quash the said award, I will have had absolutely no difficulties in denying him the order on the foregoing premises. However, the applicant has gone further to ask in his statutory statement that an order of certiorari do issue to bring into this court for purposes of quashing the adoption proceedings of the award dated 15<sup>th</sup> November, 2010.

The 2<sup>nd</sup> technical issue raised by the interested party is that prohibition cannot issue in respect of a decision which has been rendered. That prohibition looks into the future and does not concern proceedings and or decisions that have already been rendered. Again I entirely agree with this proposition of the Law. I also agree that an order of prohibition cannot issue against the interested party. After all orders of prohibition can only issue and or are normally directed against public bodies and or authorities. Such orders cannot therefore issue against a private citizen and or body which is not clothed with public duty. However, in the circumstances of this case the applicant is seeking to prohibit the implementation of the award and the consequential judgment. The award though adopted as a judgment of the court has yet to be implemented or executed. It can only be implemented in the future and by the 2<sup>nd</sup> respondent. In those circumstances, the applicant would be perfectly entitled to seek an order of prohibition against the 2<sup>nd</sup> respondent.

In the result, I allow the Notice of motion dated 2<sup>nd</sup> December, 2010 in terms of prayers 1 and 2. The applicant shall also have the costs of these proceedings.

Ruling **dated, signed and delivered** at Kisii this 4<sup>th</sup> day of May, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**

