



(Act 18 of 1990) Land Disputes Tribunals Act; Plenitude of the Tribunal’s powers under Section 3 of Act 18 of 1990

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
MISC. APPL. NO. 2 OF 2010(JR)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE A MOTION
ON JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

Between

JOHN KIPRONO MAINA APPLICANT

VERSUS

THE CHAIRMAN SIGOR DIVISION

LAND DISPUTES TRIBUNAL1ST RESPONDENT

SPM’S KERICHO LAW COURTS2ND RESPONDENT

KIBII MAINA3RD RESPONDENT

PAUL KOECH4TH RESPONDENT

RULING

A Notice to the Registrar pursuant to Order LIII Rule 1(3) of the Civil Procedure Rules was given on 19th January, 2010 by John Kiprono Maina, the Applicant, of his intention to apply for an order of certiorari. A Chamber Summons application dated 20th January, 2010 was filed by the said Applicant on 20th January, 2010 seeking leave to apply for an order of certiorari (wrongly referred to as a writ) to remove into this court for quashing the decision of SIGOR DIVISION LAND DISPUTES TRIBUNAL dated 26th October, 2009 which was subsequently adopted on 2nd December, 2009 as the judgment of the court in KERICHO SENIOR PRINCIPAL MAGISTRATE’S MISC. APPLICATION NO. 94 OF 2009. The Hon. Lady Justice Mary Ang’awa granted leave to the said applicant on 26th January, 2010 and directed that the application by way of Notice of Motion pursuant to rule 3 of Order LIII of the Civil Procedure Rules be filed within 21 days and served. This was done as on 15th February, 2010, the ex parte applicant, John Kiprono Maina, filed the Notice of Motion dated 4th February, 2010 pursuant to the said order and rule. The 1st and 2nd Respondents did not file a replying affidavit. However, the 3rd and 4th Respondents filed a replying affidavit sworn on 29th March, 2010 by the 4th Respondent.

When the hearing of the Notice of Motion commenced on 26th April, 2010, the ex parte applicant and the 1st and 2nd Respondents recorded a consent to the effect that the said Motion “be allowed as against the 1st and 2nd Respondents with no order as to costs”.

The ex parte applicant then proceeded to prosecute the Notice of Motion against the 3rd and 4th Respondents.

Mr. Siele Sigira, learned counsel for the ex parte applicant, urged the court to grant the order of certiorari on the ground that Sigor Land Disputes Tribunal did not have jurisdiction to make the decision that it

made with regard to land title No. KERICHO/SIGOR/1197 for the simple reason that **Act 3 of 1990** does not confer jurisdiction on the Tribunal to determine issues of title to land.

Mr. W.R. Kiprono, the learned counsel for the 3rd and 4th Respondents opposed the application and contended that the application was defective and incompetent because no leave to apply for the order of certiorari was sought or obtained before the Notice of Motion was filed as this was not reflected in the statement of facts. But a perusal of the court file shows that the Hon. Lady Justice Mary Ang'awa granted leave on 26th January, 2010 and a formal order in this regard was extracted and issued on 4th February, 2010. The statement of facts dated 19th January, 2010 was filed in court on 20th January, 2010 contemporaneously with the Chamber Summons seeking leave to apply for an order of certiorari. It could not, at that point in time, contain the averment that leave was granted as the application for leave was yet to be heard.

Mr. Kiprono also urged the court to dismiss the Notice of Motion on the ground that it does not disclose the title or reference to the land in respect of which the order for certiorari was sought. It was Mr. Kiprono's submission that the affidavit verifying the facts sworn by the ex parte applicant had introduced confusion. He did not amplify that submission but he alluded to the failure by the ex parte applicant to exhibit interest in the parcels of land to which the application relates. It was his contention that the ex parte applicant did not disclose the parcel of land which was the subject of the award. Moreover, he said, the consent recorded by the 1st and 2nd Respondents was defective and meaningless as it reflected no reference to title to land.

I have perused the application and the replying affidavit by the 3rd and 4th Respondents. I have also duly considered the submissions of counsel for the ex parte applicant and of both counsel appearing for the Respondents. The relief sought in the application was stated in paragraph 1 of the Notice of Motion dated 4th February, 2010 as well as paragraph 2 of the statement of facts dated 19th January, 2010 to be

“That this Honourable Court be pleased to grant an order of certiorari removing unto this Honourable Court of purposes of being quashed forthwith the decision of the Chairman Sigor Division Land Disputes Tribunal award dated 26th October, 2009 and which was subsequently read as judgment of the Court being KERICHO SPMCC MISC. APPL. NO. 94 OF 2009, on 2nd December, 2009”

The Sigor Land Disputes Tribunal made the following decision

“VERDICT

- 1. The land belongs to Maina Arap Yegen.**
- 2. This land registration No. KER/SIGOR/1197 be sub-divided equally into two sons:

1st son – Kibii Maina and
2nd son – John Kiprono Maina**
- 3. John Kiprono Maina registered the land to his name illegally.**
- 4. The Chief Sugumerga gave him two weeks to appeal in the two cases done in 2005 and 2009 respectively but he didn't appeal”**

The land affected by the decision of the Sigor Land Disputes Tribunal was clearly Land reference No. KERICHO/NYAMBUGO/1197. The decision /award of the Sigor Land Disputes Tribunal was adopted as a judgment of the Court by the Resident Magistrate at Kericho in Kericho S.P.M. MISC.APPLICATION NO. 94 OF 2009 and a decree was extracted therefrom stating:

“THIS MATTER coming up for reading/adoption of the Tribunal's Award in respect to land parcel KERICHO/SIGOR/1197 on 2nd December, 2009 before Hon. N. Wairimu – RM

“IT IS HEREBY ORDERED

1. ***THAT the award of the Tribunal is adopted as order of the Court.***
2. ***THAT the land belongs to MAINA ARAP YEGEN.***
3. ***THAT the land be sub-divided equally into two***
1st son – KIBII MAINA
2nd son- JOHN KIPRONO MAINA
4. ***THAT JOHN KIPRONO MAINA registered the land in his name illegally.”***

In paragraph 2 of the verifying affidavit in support of the motion, the ex parte applicant averred that he is the registered proprietor of land title No. KERICHO/SIGOR/1197. He annexed to the said affidavit a copy of the certificate of official search in respect of land title NO. KERICHO/SIGOR/1197 dated 22nd October, 2009 showing that, as at 22nd October, 2009, Kiprono Maina John, was the proprietor of the said parcel of land. There were no inhibitions, or encumbrances registered against the title as at the date. There was no dispute either that the names appearing in the said certificate of title related to and were those of the ex parte applicant. With respect to counsel for the 3rd and 4th Respondents, the argument therefore that the application did not indicate the title to the land in respect of which the order of certiorari is sought did not hold good. Nor can it be correctly said that the consent between the ex parte applicant and the 1st and 2nd Respondents was necessarily defective.

The plenitude of the powers of the Land Disputes Tribunal under **Section 3 of The Land Disputes Tribunals (Act 3 of 1990)** does not include adjudication of interest to title to land or to issues of contract or of trust law. Unfortunately, the elders who sit in the Land Disputes Tribunals have no advocate to guide them as to the ambit of their jurisdiction under the said Act. And this is so because **Rule 19 of The Land Disputes Tribunal (Forms and Procedure) Rules 1993** expressly states that parties to disputes before the tribunals shall not be entitled to appear or to be represented by advocates. The Magistrate court to which the award of elders is sent to be adopted as a judgment of the court pursuant to **Rule 20** of the said Rules is enjoined to enter judgment in accordance with the decision of the Tribunal and upon such judgment being entered, a decree is issued which can be enforced in the manner provided by the Civil Procedure Act. It is plain to see that the decision of the Sigor Land Disputes Tribunal was **ultra vires** its powers under **Section 3 of Act 18 of 1990**. It was null and void on that account. I so hold. The award that the Magistrate court purported to adopt as a judgment of the Court was null and void and it did not get a life nor could it be resuscitated merely because a court of law adopted it. It was void in law and it remained void in law even after its adoption. Perhaps it is about time the Law Reform Commission and the office of the Attorney General looked into the need to empower the Magistrates under **Rule 20 (supra)** to determine whether awards sought to be adopted as judgments of the court have violated **Section 3 of Act 18 of 1990**. This would save the public money and time spent on litigation to set aside awards that are made **ultra vires** the Act. Appointment of a lawyer as a member of the Tribunal would also help to guide the Tribunal on issues of law. This would stem the tide of the awards flooding the High Court for quashing on the ground that they are **ultra vires Section 3 of Act 3 of 1990**.

It is my finding that the award by Sigor Land Disputes Tribunal was **ultra vires** their powers and therefore was null and avoid. I so find. The adoption of the award by the Magistrate court did not give it life. I also so find. The judgment of the Magistrate Court was a nullity. I so hold. The ex parte applicant is entitled to the order of certiorari which he seeks. I so hold.

In the result, I allow the application. An order of certiorari shall issue to quash the decision of the Sigor Divisional Land Disputes Tribunal dated 26th October, 2009 relating to land title NO. KERICHO/NYAMBUNGO/1197 and the judgment and decree of the Senior Principal Magistrate Court at Kericho dated 2nd December, 2009 made in Misc. Application No. 94 OF 2009. I award the costs of the application to the ex parte applicant against the Respondents who shall be jointly and severally liable to

pay the same.

DATED at **KERICHO** this 21st day of July, 2010

G.B.M. KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING

Mr. Siele Sigira for the Applicant instructed by Messrs Siele Sigira & Company Advocates

Mr. Mwendwa for the 1st and 2nd Respondents instructed by Messrs Mwendwa & Company Advocates

Mr. Kiprono for the 3rd and 4th Respondents instructed by Messrs Kiprono & Company Advocates