



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Miscellaneous Civil Application 58 of 2010**

**IN THE MATTER OF AN APPLICATION BY YOSIFIN MONARI FOR JUDICIAL REVIEW  
IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

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

**AND**

**IN THE MATTER OF MOSOCHO LAND DISPUTES TRIBUNAL CASE NO.16 OF 2009**

**AND**

**IN THE MATTER OF KISII CMC MISC.CIVIL.APPL.NO.23 OF 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MOSOCHO LAND DISPUTES TRIBUNAL.....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**

**ATANASI OMWENGA OTETE.....INTERESTED PARTY**

**EX PARTE**

**YOSIFIN MONARI**

**JUDGMENT**

**1. Introduction:**

The exparte applicant, **Yosifin Monari**(hereinafter referred to only as “**the applicant**”) is said to be the owner of all that parcel of land known as **L.R.No. West Kitutu/Bogusero/4911**(hereinafter referred to as

**“Plot No.4911”**). On the other hand, the interested party is the registered proprietor of all that parcel of land known as **L.R.No.West Kitutu/Bogusero/4921**(hereinafter referred to as **“the suit property”**). Plot No.4911 and the suit property are subdivisions of the original parcel of land known as **L.R.No.West Kitutu/Bogusero/698**(herein after referred to as **“Plot No.698”**) which was allegedly owned by one, **James Nyamwega Ombiro**. The suit property and Plot No.4911 share a common boundary. Both were sold to the interested party and the applicant respectively by the said James Nyamwega Ombiro. Sometimes in the year 2009, a dispute arose between the interested party and the applicant over the boundary of the suit property. The interested party claimed that the applicant had trespassed into the suit property. The interested party complained against the applicant and the said James Nyamwega Ombiro before the area assistant chief but the said assistant chief could not arbitrate over the dispute because James Nyamwega Ombiro declined to appear before the said assistant chief. In the circumstances, the assistant chief advised the interested party to lodge his complaint with Mosochi Land Disputes Tribunal, the 1<sup>st</sup> respondent herein. The interested party proceeded to file a complaint against the applicant and the said James Nyamwega Ombiro with the 1<sup>st</sup> respondent which was assigned Case No. 16 of 2009 over the said dispute. The 1<sup>st</sup> respondent heard the complaint and rendered its decision on 25<sup>th</sup> February, 2010. The 1<sup>st</sup> respondent made a finding that the applicant had trespassed on the suit property and ordered that arrangement be made with Kisii Land Registry to visit the suit property for the purposes of fixing its boundary. The 1<sup>st</sup> respondent ordered further that the applicant be evicted from the suit property. The said decision by the 1<sup>st</sup> respondent was filed with the 2<sup>nd</sup> respondent for adoption as a judgment of the court but the proceedings were kept in abeyance to await the outcome of this application. The applicant was aggrieved by the said decision of the 1<sup>st</sup> respondent and decided to bring these proceedings to challenge the same.

2. The applicant sought and obtained leave of this court on 5<sup>th</sup> July, 2010 to institute the present application for judicial review which seeks orders of certiorari and prohibition. The application was filed on 7<sup>th</sup> July, 2010. The application was brought on the grounds set out in, the body thereof, the Statement filed pursuant to the provisions of Order 53 rule 1(2) of the Civil Procedure Rules and the Supporting Affidavit of the applicant sworn on 7<sup>th</sup> July, 2010. The application seeks the following reliefs;

- i. An order of certiorari to remove to the high court and quash the proceedings and the decision delivered by the 1<sup>st</sup> respondent on the 25<sup>th</sup> February, 2010 in Mosochi Land Disputes Tribunal Case No. 16 of 2009;**
- ii. An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the interested party by themselves or through their agents and/or servants from implementing the orders made by the 1<sup>st</sup> respondent on 25<sup>th</sup> February, 2010.**

3. **The grounds on which the application has been brought;**

The decision of the 1<sup>st</sup> respondent was challenged by the applicant on the following main grounds;

- i. That the 1<sup>st</sup> respondent had no jurisdiction to make the award dated 25<sup>th</sup> February, 2010 and,**
- ii. That the said award was illegal to the extent that it ordered the re-survey of the suit property which was registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) contrary to the provisions of sections 27 and 28 of the said Act.**

In summary, the applicant claims that the applicant and one, Joseph Monari Atambo are the registered proprietors of the parcel of land known as **L.R.No.West Kitutu/Bogusero/5027**(hereinafter referred to as **“Plot No.5027”**) which she claims to be a subdivision of Plot No.698. The applicant claims that since Plot No. 5027 was not the subject of the interested party’s complaint before the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent had no jurisdiction to order the eviction of the applicant from the suit property which was the subject matter of the dispute before the 1<sup>st</sup> respondent. The applicant contends that the interested party

had no jurisdiction to order for her eviction since it could not arbitrate on a dispute over land registered under the Registered Land Act, Cap.300, Laws of Kenya (now repealed). The applicant claims that the 1<sup>st</sup> respondent acted *ultravires* its powers by ordering a re-survey of the suit property and Plot No.4911. The applicant contends further that, the decision of the 1<sup>st</sup> respondent was bad in law and was reached in breach of the rules of natural justice. The application was not opposed by the respondents. The Attorney General filed a notice of appointment of advocates on behalf of the respondents but neither filed a response to the application nor appeared in court for the hearing. The application was opposed by the interested party. The interested party filed a replying affidavit sworn on 27<sup>th</sup> June, 2011 in response to the application. The interested party supported the 1<sup>st</sup> respondent's decision and opposed the application mainly on one ground, namely;

**i. That the dispute before the 1<sup>st</sup> respondent concerned trespass to land and the determination of the boundary of the suit property and as such the same was within the jurisdiction of the 1<sup>st</sup> respondent;**

**ii. The affidavit filed by the applicant in support of the application is fatally defective and as such the application lacks basis or foundation.;**

4. The issues that present themselves for determination in this application are as follows;

**i. Whether the 1<sup>st</sup> respondent had the jurisdiction to entertain the interested party's complaint and to make the decision complained of; Whether the said decision was valid;**

**ii. Whether the applicant's application is competent in light of the alleged defect in the affidavit in support thereof;**

**iii. Whether the applicant is entitled to the reliefs sought against the respondents and the interested party.**

5. **Issue No.1:**

The 1<sup>st</sup> respondent was a creature of a statute namely, The Land Disputes Tribunals Act, No.18 of 1990 (now repealed)(hereinafter referred to as "the Act"). As a creature of Act, the composition and powers of the 1<sup>st</sup> respondent were spelt out in the said Act. The 1<sup>st</sup> respondent could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the 1<sup>st</sup> respondent had jurisdiction as follows;

**".....all cases of civil nature involving a dispute as to(a) the division of, or the determination of boundaries to, land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land."**

In section 2 of the said Act, Land is defined as including land registered under the Registered Land Act, Cap.300, Laws of Kenya (now repealed). It is clear from the foregoing that the 1<sup>st</sup> respondent had jurisdiction to determine the boundary dispute between the interested party and the applicant and the issue as to whether or not the applicant had trespassed into the suit property. I do not think that the 1<sup>st</sup> respondent was divested of this jurisdiction because Plot No. 5027 which the applicant claims to own was not the subject of the proceedings before the 1<sup>st</sup> respondent. This is for two reasons. First, it is not clear to the court where Plot No.5027 which is claimed to be a subdivision of Plot No. 698 came from. From the mutation attached to the applicant's affidavit sworn on 28<sup>th</sup> June, 2010 in support of the application for leave, it is clear that Plot No. 698 was subdivided into five (5) portions only namely, Plot Nos.4910, 4911, 4912, 4913 and 4921. The applicant has not explained how Plot No.4911 which is said to have been sold to her by James Nyamwega Ombiro came to be known as Plot No.5027 owned by the applicant and Joseph Monari Atambo. In the absence of a denial by the applicant that she is the proprietor of Plot No.4911 whose boundary was in dispute before the 1<sup>st</sup> respondent and an explanation how the land

reference number for the said plot was changed to No.5027 if at all, this court can only assume that the applicant owns Plot No.4911 whose boundary with the suit property was the subject of a complaint before the area assistant chief and subsequently before the 1<sup>st</sup> respondent. It follows therefore that the issue of Plot No.5027 not having been the subject of the dispute before the 1<sup>st</sup> respondent is neither here nor there. In any event, the 1<sup>st</sup> respondent never made any reference to Plot No.5027 in its decision. Secondly, even if the interested party had given incorrect land reference number for the parcel of land that shares a common boundary with the suit property in her complaint before the 1<sup>st</sup> respondent, that would not have affected the 1<sup>st</sup> respondent's jurisdiction to determine the complaint. This would have only affected the efficacy of the order that would have been made if it was made with reference to a non-existent parcel of land. The issue ought to have been raised before the 1<sup>st</sup> respondent and could only form a ground for appeal but not judicial review. Due to the foregoing I am in full agreement with the submission by the advocates for the interested party that the 1<sup>st</sup> respondent acted intra vires its powers in making the decision dated 25<sup>th</sup> February, 2010.

## 6. Issue No.2:

The 1<sup>st</sup> respondent in its decision dated 25<sup>th</sup> February, 2010 made a declaration that the applicant had trespassed on the suit property. The 1<sup>st</sup> respondent then ordered the land registry Kisii to visit the suit property and fix its boundary and the applicant to be evicted immediately from the suit property. In a boundary dispute, the 1<sup>st</sup> respondent had jurisdiction to make these orders. The 1<sup>st</sup> respondent had jurisdiction under the Act to determine disputes concerning boundaries and trespass and to make appropriate orders. When the 1<sup>st</sup> respondent arbitrated over a boundary dispute between the interested party and the applicant and came to the conclusion that the applicant had trespassed into the interested party's land, the appropriate order to make was that for the eviction of the applicant. I cannot see how such an order could be said to have been outside the jurisdiction of the 1<sup>st</sup> respondent to make. It is therefore my finding that the order made by the 1<sup>st</sup> respondent was valid unless overturned on appeal for other reasons. The order did not in any way contravene the provisions of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) as claimed by the applicant. Parliament in its wisdom gave Land Disputes Tribunal the power to arbitrate on boundary disputes over land registered under the Registered Land Act, Cap.300, Laws of Kenya (now repealed). The 1<sup>st</sup> respondent cannot therefore be faulted for exercising such power. The 1<sup>st</sup> respondent did not order the suit property to be re-surveyed or that the same be "given" to the interested party as alleged by the applicant. The 1<sup>st</sup> respondent's decision was not a nullity as claimed by the applicant. The statement by Lord Denning in the case of **Macfoy –vs-United Africa Company Limited (1961)3 All ER 1169** cited by the applicant is not relevant in the circumstances.

## 7. Issue No.3:

Having reached the conclusion that the order made by the 1<sup>st</sup> respondent was within its jurisdiction to make, I need not consider this issue. However, for the purposes of creating certainty in the procedure of instituting judicial review applications, I would like to state that I am in agreement with the submission by the advocate for the interested party that the applicant's application was not properly brought before the court as the affidavit purportedly filed in support thereof had very little evidential value and the court was not even obliged to consider the same. The applicant's application for leave was supported by a **statement, "a supporting affidavit"** sworn on 30<sup>th</sup> June, 2010 which had one (1) annexure, "**affidavit**" sworn on 28<sup>th</sup> June, 2010 also with one (1) annexure and a "**verifying affidavit**" sworn on 28<sup>th</sup> June, 2010 which had no annexure. The statement was filed pursuant to the provisions of **Order 53, Rule 1(2)** of the old **Civil Procedure Rules**. It is not clear under what provisions of the law the **supporting affidavit** and the **affidavit** were filed. The contents of the same were to a large extent similar. The same contained facts which were relied upon by the applicant in support of the application for leave. On the other hand, the **verifying affidavit** was a short six (6) paragraph affidavit. It contained merely the description of the applicant and an averment that the contents of the statement are true. As was stated in the Court of Appeal case of, **Commissioner General, Kenya Revenue Authority-vs-Silvano Onema**

**Owaki, Kisumu, Court of Appeal, Civil Appeal No.45 of 2000(unreported)**, in an application for judicial review, all the facts should be contained in the verifying affidavit. In this case, the applicant did set out the facts in “**a supporting affidavit**” and “**affidavit**” instead of having the same in the **verifying affidavit**. There is no provision for “**a supporting affidavit**” and “**an affidavit**” in addition to the **verifying affidavit** under **Order 53 Rule 1(2)** of the **Civil Procedure Rules**. The rule allows an applicant to file more than one verifying affidavit. This does not mean however that an applicant can file three (3) sets of affidavits all sworn by himself but titled, supporting affidavit, affidavit and a verifying affidavit respectively as was done in this case. The other short coming in the application that I would wish to point out is that, once leave is granted, the Notice of Motion application need not be supported by another affidavit. The same should be based on the verifying affidavit(s) that was filed at the leave stage. The court can of course allow an applicant under **Order 53, Rule 4(2)** to rely on further affidavits. In this case, the applicant filed the Notice of Motion application and another “supporting affidavit” sworn on 7<sup>th</sup> July, 2010 in support thereof. This was improper. The court while considering an application for judicial review is only supposed to consider the verifying affidavit that was filed at the leave stage unless leave is sought and an applicant is allowed to rely on further affidavits. The “supporting affidavit” that was filed by the applicant in support of the Notice of Motion application did not have any annexures to it. This explains why the interested party questioned its probative value. Whereas the earlier affidavits contained annexures comprising of copies of the proceedings and decision of the 1<sup>st</sup> respondent complained of herein and a mutation which shows how the properties the subject of this application came to be, the present supporting affidavit had none of these. Fronted as the affidavit on which the Notice of Motion application was based, it is not far-fetched to say that the application had no basis or foundation as submitted by the advocates for the interested party. While I agree with the interested party that these were serious procedural flaws on the part of the applicant, this court in light of the provisions of **Section 159(2)(d)** of the **Constitution of Kenya, 2010**, would not have without more dismissed the present application on account of the same.

#### **8. Issue No.4:**

I have already reached the conclusion that the 1<sup>st</sup> interested party had the jurisdiction to make the decision that it made and that the order that flowed therefrom was valid. In the circumstances, the Notice of Motion application dated 7<sup>th</sup> July, 2010 is not for granting. The applicant has failed to make out a case for the orders of certiorari and prohibition sought against the respondents and the interested party. The orders sought would not have issued in any event against the interested party. The interested party is neither a public body nor a public officer. Due to the foregoing, the application dated 7<sup>th</sup> July, 2010 is dismissed with costs to the interested party.

**Dated, signed and delivered at Kisii this 12<sup>th</sup> day of April, 2013.**

**S. OKONG’O,  
JUDGE.**

#### **In the presence of:-**

Mr. Nyambati for the Applicant

No appearance for the Respondents

No appearance for the Interested Party

Mobisa Court Clerk

**S. OKONG’O,  
JUDGE.**