



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW NO. 12 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR ORDERS OF CERTIORARI, MANDAMUS & PROHIBITION

AND

IN THE MATTER OF ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS,

PROTECTION AND GUARANTEES UNDER ARTICLE 25(a), (b) and (c), ARTICLE 40

AND

IN THE MATTER OF LAND ACT NO. 12 OF 2012

AND

IN THE MATTER OF LAND ADJUDICATION ACT

SAMUEL MWANGI KAHARA.....APPLICANT

VERSUS

DLASO, UPPER ATHIRU GAITI 'C' ADJUDICATION SECTION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

ELIJAH MUTUMA JOHANNA.....INTERESTED PARTY

RULING

A. The application

1. The ex parte applicant by an application dated 7.2.2022 seeks for the review of the judgment dated 1.12.2021 and stay of its execution. The application is supported by an affidavit sworn on 7.2.2022 accompanied by annexures marked SMK 1-4

respectively.

2. The grounds of the application are:- vital documents were not availed before the court by his former advocates on record the applicant; mistake of counsel should not be visited upon it is in the interest of justice and fair hearing the application be allowed; the application has been brought promptly and there would be no prejudice to the respondents.

3. The applicant has deposed in the supporting affidavit he had initially filed PMCC No. 399 of 1998 at Maua law courts and secured a permanent injunction regarding Parcel No. Upper Athiru Gaiti 1980 now Parcel No. 365 leading to appeal No HCCA No. 141 of 2000 which appeal was dismissed on 18.9.2007. The applicant avers parcel no. 365 was initially known as 1890 but was changed by the demarcation officer in 2016. He avers the previous lawyer left out above the ruling and the judgment which were relevant and had the court looked at them it would have reached a different decision.

4. The respondents was granted leave to put in a replying affidavit within 7 days from 28.2.2022. None were filed as ordered or at all. Similarly there is no affidavit of service filed to indicate if interested party was ever served with this notice of motion.

B. Written Submissions

5. Parties were also directed to put in written submissions by 28.3.2022. The applicant submits under Order 12 rule 7 Civil Procedure Rules, section 3A Civil Procedure Rules that the court has made an unfettered discretion to set aside or vary a judgment. Reliance is placed on *Patel vs E.A Cargo Handling Service Ltd (1974) E.A 75*, *Wachira Karani vs Bildad Wachira (2016) eKLR*, *Esther Wamaiha Njihia & 2 others vs Safaricom, Richard Ncharpi Leiyagu vs IEBC & 2 others (2013)eKLR*.

6. The ex parte applicant submits the failure to adduce vital documents was purely as a result of negligence and or recklessness on the part of his former counsel on record and hence mistakes of counsel should not be visited upon him.

7. Reliance was placed on *Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 others (2015) eKLR*.

8. Further the applicant submits he was neither at fault nor privy to the default on the part of his former counsel and only learned of the omission after the judgment. Reliance was placed on *Christopher Muriithi Ngugu vs Eliud Ngugu Evans (2016) eKLR*, *NBK Ltd vs E. Muriu Kamau & another (2009)* on the proposition that an advocate handling matters on behalf of this client is expected to possess expertise and Article 50 of the Constitution that there is need to grant the applicant an opportunity to present his case and bring on board the documents left out which raise triable and legal issues particularly on whether the 1st respondent had jurisdiction to hear and determine the objection proceedings. Reliance was placed on *Martha Wangari Karua vs IEBC & 3 others (2013) eKLR* on the proposition that rules of natural justice require that the court must not necessarily drive away any litigant from the seat of justice without a hearing however weak his or her case may be.

Background information

9. By a chamber summons dated 26.9.2019 the ex parte applicant sought leave to commence Judicial Review proceedings regarding a decision dated 1.5.2019 by the respondents over Parcel no. 365 Igembe adjudication area Upper Athiru Gaiti C.

10. The said chamber summons was accompanied by a statement of facts dated 26.6.2019 and an affidavit verifying the facts sworn by Samuel Mwangi Kahara on the even date attaching the decision, demarcation record confirmation letter dated 5.6.2007 indicating Parcel No. 1890 and 1891 Upper Athiru Gaiti adjudication section was registered under his name in line with Land Adjudication Act Cap 284 and unauthenticated map which indicated two different numbers namely parcel no. 1890/365 and 1891/366.

11. The court proceeded to grant leave on 17.7.2019 and diverted that the substantive motion to be filed within 21 days from the date thereof.

12. There was no compliance with the 21 days deadline following which the applicant sought for the extension of time vide application dated 23.9.2019. Leave was granted to lodge the notice of motion out of time leading to the filing of the application dated 13.2.2020.

13. The notice of motion dated 13.2.2020 was supported by the applicant's affidavit sworn on 13.2.2020 attaching the decision by the 1st respondent, demarcation book and a sketch map.

14. Similarly in the said notice of motion, the applicant indicated one of his grounds on the face of the notice as the judgment in HCCA 141 of 2000 rendered in his favour.

15. That ground however was neither included both in the statement of facts dated 26.6.2019 nor in the affidavit verifying facts sworn by the applicant on the even date.

16. Having set the court record herein, the applicant is now seeking for review/setting aside and stay of execution of the judgment. He has invoked Orders 9 Rule 9, 12 Rule 7, 22 Rule 5, 45 Rule 1 Civil Procedure Rules and Civil Procedure Act Section 3, ELC Act and Article 5 of the Constitution.

17. In the submissions dated 21.3.2022 the whole of the submissions and authorities relate to Orders 12 Rule 7. On setting aside an exparte judgment, looking at the record as set above, the matter was heard on merits. The respondents were duly served with the notice of motion herein as well as the interested party. The interested party filed a replying affidavit sworn on 14.4.2021 wherein he indicated that upon demarcation, the applicant combined the land he had bought into Parcel No. 365 even though on the ground there were clear boundaries between Parcel No's 365 and 365 which during demarcation were changed from parcels no. 1890 and 1891.

The Interested Party

18. He averred he had requested the applicant to transfer back the land but he refused hence the objection which was heard and a decision made for parcel no. 365 to be divided in order to give back a portion that had wrongfully been merged to him.

19. Given the foregoing my finding is that the judgment delivered on 1.12.2021 was not an exparte judgment since all the parties fully participated in the proceedings.

20. Coming to Order 45 Rule 1 Civil Procedure Rules as read together with Section 8 Civil Procedure Act, section 80 of Civil Procedure Act provides that any person who considers himself aggrieved by a decree or order from which an appeal is allowed both from which no appeal has been preferred or by a decree from which no appeal is allowed, may apply for review of the judgment to the court which passed the decree.

21. Order 45 Rule 1 Civil Procedure Rules provides the grounds for review as discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be procured by him at the time when the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The applicant has also to file the application without unreasonable delay.

22. In this matter the court pronounced itself on 1.12.2021 based on the pleadings in the court file among which was the decision sought to be quashed dated 1.5.2019. The turning point in the notice of motion was whether the exparte applicant had exhausted the internal dispute resolution mechanism as set out under the Land Adjudication Act cap 284 and filed a minister's appeal within 60 days as directed in the said decision before approaching the court.

23. The court was alive to the fact that under Section 4 of the Fair Administration Action Act, it had jurisdiction to entertain Judicial Review proceedings where there were exceptional circumstances and leave had been sought to entertain the Judicial Review application notwithstanding the non-exhaustion of the internal mechanisms.

24. The court found no exceptional circumstances and instead struck out the proceedings. The applicant herein now says that had the court been supplied with the ruling by MM Gicheru SRM as he then was now an ELC Judge and Lenaola J who had delivered the ruling and judgment respectively as he then was now a Judge of the Supreme Court of Kenya it would have reached a different conclusion.

25. As indicated above what was before the court is the statement of facts dated 26.6.2019 and the affidavit in verification of facts sworn by the exparte applicant. It had specific facts, grounds, evidence and documents relied upon, them. I have no doubt the signatures appearing on the verifying affidavits thereto belong to the applicant herein. He verified the facts and the information he had given therein. Subsequently the exparte applicant filed the substantive motion dated 13.2.2020 and signed a supporting affidavit on 13.2.2020 and proceeded to attach documents in support of his application. He now blames his erstwhile advocates for omitting what he now calls vital evidence. He says he was not aware or privy to the alleged mistake.

26. I am unable to reconcile and or accept such an explanation given that the exparte applicant swore several affidavits herein and verified the facts. The applicant must have read through the documents he was signing and filing before court. The case belonged to him and not his lawyers. He was party to any omissions thereto. The issue was whether he filed the minister's appeal or not. If at all he knew the previous decisionS existed, I do not see why he would sign several affidavits and fail to notice the anomaly.

27. Consequently I find no mistake or error or new and important evidence which the applicant had not produced at the time the decree was passed herein.

28. Lastly and more importantly the discretion to review a decree or order is only available if no appeal has been preferred or a right of appeal is unavailable to a party.

29. In this matter the applicant lodged with and the deputy registrar of this court acknowledged a notice of appeal dated 13.12.2021.

30. Once the applicant opted to take the route of an appeal he lost a right of review before this court. The applicant cannot have it both ways. He has chosen the route of appeal and cannot therefore come back to this court for review. This ground for review also appear to be for an appeal as opposed to a review.

31. On the issue of the stay of execution, the application is also filed by a law firm lacking capacity. Be that as it may and given the affidavit of service showing the former law firm has been served with the application, I grant leave to the firm of Ngentu & Co. Advocates to come on record for the judgment debtor herein.

32. Notwithstanding the application was filed by a law firm without capacity stay of execution under Order 22 Rule 52 Civil Procedure Rules, I have not seen any notice of execution or objection to attachment pursuant to order 22 rule 51 civil procedure rules for this court to determine whether execution should go on or be stayed for 14 days by an attaching creditor.

33. There is no material before me to establish if the execution of costs or decree has commenced and by which party.

34. In the circumstances I find prayer no. 3 and 4 of the notice of motion dated 7.2.2021 lacking merits. The application hereby is dismissed save for prayer no. 2 thereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF APRIL, 2022

In presence of:

Agents for applicant

Kendi for respondent

HON. C.K. NZILI

ELC JUDGE



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