



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL CASE NO. 74 OF 2008**  
**LUKE NJIRU KAGEREKI.....APPLICANT/PLAINTIFF**  
**VERSUS**  
**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION..1ST**  
**RESPONDENT/DEFENDANT**  
**EDWIN NYAGA NYAMURA.....2ND RESPONDENT/INTERESTED PARTY**

**R U L I N G**

1. In its notice of motion dated 24/10/2016, the applicant seeks orders for review of the order made by Bwonwonga, J. on 22/09/2016. The twin prayer also calls for recall of the said order and for the restoration or otherwise for the reinstatement of the applicant's application dated 13/09/2016.
2. The grounds relied on include *inter alia* that there was an error apparent on part of the record in that the court entertained an oral application to disqualify itself from hearing the case. The court did not even record the grounds on which the application was based.
3. The court on 4/07/2016 directed that the matter be mentioned before the Deputy Registrar to be given a hearing date before another judge. The applicant states that the court presided over by Bwonwonga, J. then became *functus officio* and was not supposed to continue dealing with the matter.
4. According to the applicant, it was therefore wrong for the court to proceed with the matter and make substantive orders that the High Court lacked jurisdiction to hear this case which was termed as a land matter.
5. The applicant for the foregoing reasons seeks review of the orders of Bwonwonga, J. made on 22/09/2016 and reinstatement of its application dismissed on the same date.
6. The application was opposed by the respondents. It was argued by the 1<sup>st</sup> respondent that there was no basis for review of the orders since no new evidence or facts have been availed by the applicant.
7. It was further said that it was the applicant's counsel who applied that the case be heard in High Court No. 1 without stating any reasons. The parties appeared before Court No. 1 and it was directed that the matter be returned to Bwonwonga, J. for determination of a pending matter challenging jurisdiction where submissions had already been filed on the directions of the said judge.
8. The 2<sup>nd</sup> respondent went further to argue that the applicant had not satisfied any of the conditions stipulated under Order 45 to justify seeking review orders.

9. The parties argued the application by way of written submissions. The firm of Messrs Nahashon Karuti & Co. represented the applicant, Messrs Rugaita & Co. appeared for the 1<sup>st</sup> respondent and Messrs Beth Ndorongo & Co. were on record for the 2<sup>nd</sup> respondent.
10. The orders for which review is sought were issued by Bwonwonga, J. in his ruling delivered on 22/09/2016. He found that the ownership of the land Kagaari/Weru/544 was in dispute and that the High Court had no jurisdiction. In the same ruling the application dated 13/09/2016 filed by the applicant and which sought injunctive orders against the 2<sup>nd</sup> respondent was dismissed.
11. The applicant filed this case in the year 2008 against the 1<sup>st</sup> respondent and obtained orders issued by Khaminwa, J. from selling the applicant's land Kagaari/Weru/544 which was given as security for a loan in favour of the applicant. However, the land had been sold by the 1<sup>st</sup> respondent in exercise of its statutory powers before the court issued the injunctive orders. Hon. Khaminwa, J. issued further orders nullifying the sale of the land by the 1<sup>st</sup> respondent.
12. The 2<sup>nd</sup> respondent is the one who bought the land by public auction and got the land registered in his name. He was joined in this suit as the 2<sup>nd</sup> respondent.
13. There are two issues arising from this application. Firstly is whether the applicant has satisfied the requirements of Order 45 of the Civil Procedure Rules. Secondly, whether this court has jurisdiction to review the orders made by another judge of contemporary jurisdiction.
14. Order 45 provides that an applicant seeking review must satisfy the court that:-
- (a) that there is discovery of new and important evidence which was not within the knowledge of the applicant at the time the judgment, order or decree was delivered.*
- (b) that there was a mistake or error apparent on the face of the record.*
15. The applicant claimed that there was an error apparent on the record. The reasons given is that the honourable judge made orders on 4/07/2016 that the matter be mentioned before the DR to fix before another judge and thus rendering the court *functus officio*.
16. The applicant argues that the directions made on 4/07/2016 were tantamount to the judge disqualifying himself and that he should not have entertained the application challenging jurisdiction thereafter.
17. I have looked at the said directions. The mere act of sending the file to be fixed before another court does not mean that a judicial officer had disqualified himself from hearing the matter.
18. The statement of disqualification must be clear and consistent for any person reading it to understand it in its natural meaning. The directions given by the judge to mention the matter before the Deputy Registrar do not amount to disqualification in my considered opinion.
19. The judge was still properly seized of the matter when he dealt with the application of the error apparent on the face of the record are based on the same orders made on 4/07/2017 and the subsequent proceedings which followed. The applicant argues that the judge did not record the grounds relied on by the respondent for challenging jurisdiction and that the application was made orally in court.
20. The applicant has not cited any law which provides that such an application must be made formally before the court. The judge's ruling was quite comprehensive and gave the reasons for his pronouncement.
21. The applicant has not presented discovery of any new and important evidence which that has become available after the application was heard. The phrase in Order 45 Rule 1 "or any other sufficient reason"

was relied on by the applicant.

22. It was held in the case of *YUSUF VS NOKRACH [1971] EA 104* that “any other sufficient reason as set out in Order 44 Rule 1 means sufficient reason analogous to those in the rule”.

23. In the application before me, the applicant has not established any of the reasons under the rule in order to benefit from the phrase “any other sufficient reason”.

24. The second main issue in this application is whether this court is empowered to review the orders granted by a judge of equal jurisdiction. Most of the issues raised in this application would have better been sorted out in an appeal against the ruling of the honourable judge.

25. The applicant is opposed to the finding of the judge that the High Court had no jurisdiction to hear this case because it is a land matter.

26. If I was to review the said ruling, it would be tantamount to sitting on appeal on orders of the judge. The applicant ought to have appealed against the ruling so as to have the issue of jurisdiction canvassed by the right court.

27. For the foregoing reasons, I find that the applicant has not established grounds for review under order 45.

28. The application therefore fails and is hereby dismissed with costs.

29. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED THIS 29TH DAY OF MARCH, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Karuti for Applicant**

**Ms. Muriuki for Ndongoro for 2<sup>nd</sup> Respondent/Interested Party**