REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION 94 OF 2009

PARBARUNYE OLOLKUMOMORU ……..... APPLICANT

VERSUS

MINISTER OF LANDS ……1ST RESPONDENT

LAND REGISTRAR, NAROK DISTRICT…….. 2ND RESPONDENT

AND

PARSINANDE KUMOMORU ……1ST INTERESTED PARTY

LERINA KUMOMORU……2ND INTERESTED PARTY

RULING

By way of a Notice of Motion dated 25th July, 2011 the Ex Parte Applicant **PARBARUNYE OLOLKUMOMORU** sought the following orders:-

> ***"1. THAT this Honourable Court be pleased to review and/or vary the court orders of 4th March, 2011 in the following terms***
>
> ***(a) That cost therein be awarded to the exparte Applicant***
>
> ***(b) That the issue of ownership of Plots No. 82 and 63 to be excluded from the said ruling of 4th March, 2011***
>
> ***2. THAT costs of the Application be provided for"***

The application was supported by the applicant's affidavit sworn on 25th July, 2011.

The application arises from a Ruling of the High Court dated 4th March, 2011. The genesis of this suit is a boundary dispute between the applicant and his late step brother, the interested parties' father, over a parcel of land they inherited from their father. After being identified as an adjudication section, the land was demarcated by a Land Demarcation Committee which only approved the boundaries that had already been established. The applicant's step brother was dissatisfied with the demarcation by the Committee and lodged a complaint before it. His objection was allowed and the original demarcation of the land was

altered to favour the applicant's step brother.

The applicant's step brother then proceeded to subdivide his portion of the land into parcels No. 62 and 63 which he then gave to his two sons, the interested parties. The dispute then evolved into one of ownership over the two parcels of land between the applicant and the interested parties.

The Land Demarcation Committee's decision was overturned by the Arbitration Board on appeal by the applicant. The widows of the Applicant's step brother appealed against this decision of the Board to the Land Adjudication Office on behalf of the interested parties who were minors at the time. The same was allowed, and the parcels of land were awarded to the interested parties. The applicant appealed to the minister for Land's (1st Respondent) against the decision of the Land Adjudication Officer vide Land Case Nos. 147 and 158 of 1998. The District Commissioner acting for the Minister rendered his decision dated 29th May, 2009, dismissing the appeal.

The applicant then moved this court for an order of certiorari to quash the decision of the 1st Respondent, an order of prohibition to restrain the 2nd Respondent and the interested parties from acting on the said decision, and costs of the suit. The decision of the 1st Respondent was quashed by the court on the grounds that the 1st Respondent acted *ultra vires* by calling additional evidence at the time of hearing the appeal. The final pronouncement of the court was as follows-

> ***"In conclusion, the Applicant's motion dated 14th October, and filed on 15th October, 2009 succeeds, and the decision of the Board shall stand, that is plots 62 and 63 shall remain with the interested parties. The interested parties shall also have the costs of the suit"***

The applicant is aggrieved by the above pronouncement of the court which he argues contains an error apparent on the fact of the record in that it makes a determination of ownership. It was argued that after quashing the decision of the 1st Respondent, the court should not have awarded the parcels of land to the interested parties. He contended that by doing so, the court usurped the powers of the 1st Respondent and further compromised the appeal of the applicant which is still pending before the 1st Respondent as the effect of the court's ruling in quashing the 1st Respondent's decision was only to nullify it which in turn means that the applicant's appeal in still pending before the 1st Respondent. The issue of ownership was not presented before the court and accordingly the court should not have determined it. He therefore asked the court to review the judgment and omit the statement ***"the decision of the Board shall stand, that is plots 62 and 63 shall remain with the interested parties".***

The applicant also argued that the court also made an error when it awarded the interested parties the costs of the suit costs. He contended that costs should follow the events and in this case it is the ex-parte applicant being the successful party, who should have been awarded the costs. He asked the court to find the learned Judge made a mistake when he awarded costs to the interested parties and correct the same.

The interested parties filed a Replying Affidavit sworn by the 1st Interested Party on 7th February, 2012. They also relied on their submissions dated 11th August, 2014. It was their contention that even if the orders herein are not granted, the suit land would still revert in their favour because the decision of the minister would still stand. They further argued that the court has an obligation to conclude the matter before it finally and in this case, had the court not pronounced itself as it did, there would have been uncertainty. The court did not determine the issue of ownership but simply held that the decision of the board which adjudicated over the issue should stand.

On the issue of costs, it was argued that section 27 (1) of the Civil Procedure Act provides that the costs of the suit should follow the event but the court has full powers to determine by whom and out of what property and to what extent such costs are to be paid. Counsel relied on the case of **DEVRAM DATTAN Vs DAWDA [1949] EACA 35** where the court held that the right of a successful party in litigation to courts is left to the discretion of the trial court and being a judicial discretion it must be exercised based on facts. It is for the court to decide the sufficiency of the grounds upon which he bases his decision. In

the instant case, the court exercised its discretion to award the costs to the interested parties after finding that the suit herein was a sham, frivolous and vexatious.

ANALYSIS AND DETERMINATION

The Ex Parte applicant had made two prayers to this court as follows

(i) A variation of the court's ruling of 4th March, 2011 due to errors apparent on the face of the record

(ii) That costs be awarded to the Ex Parte Applicants.

The matter was disposed of by way of written submissions and all parties did duly file their written submissions in court.

With respect to the first prayer the Ex Parte Applicant has submitted that there existed errors apparent on the face of the record in reference to the ruling dated 4th March, 2011. In that ruling the court stated as follows

"The decision of the Board shall stand, that is Plots 62 and 63 shall remain with the interested parties".

The Ex Parte applicants had sought the review on the basis that this statement of the court amounted to a determination of the question of ownership which question had not been placed before the High Court. The applicant further contended that such an action (conferring of proprietary rights) would compromise an appeal pending before the Minister of Lands. Did this statement confer proprietary rights of ownership in the two plots on the interested parties. An error was defined by the court in **NYAMOGO VS NYAMOGO ADVOCATES VS KAGO [2001] 1EA 73** as follows-

"An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. When an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which had to be established by a long process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view is possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal".

In **MUYODI VS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION & ANOTHER [2006] 1E.A 243** it was further stated that-

"For one to succeed in having an order reviewed for mistake or error apparent on the face of the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal".

A look at the body of the Ruling in question reveals that the court stated that it was the Arbitration Board which was chaired by the Land Adjudication Officer which made the decision to award the two plots to the interested parties. The intention therefore of the High Court was only to quash the decision of the Minister which is the decision that had been challenged before it. By stating that the decision of the Land Adjudicator Board would stand, the court clarified that it was **not** its intention to reverse the decision of the Land Adjudication Officer which in any event had **not** been challenged by the applicant. Nowhere in this ruling did the High Court purport to make any determination regarding the question of ownership.

Even if I were to accept the Ex Parte applicant's contention that the ruling of 4th March, 2011 did in fact confer proprietary rights in the two plots, on the interested parties – does this amount to an error apparent on the face of the record, which can be cured by way of review. I think not. This would amount not to an 'error' but would basically amount to a ground of appeal. Once a court has rendered itself over any matter, that court becomes ***'functus officio'***. The court cannot later revise its ***'ration decidendi'*** under the guise of a review. This court therefore being a court of concurrent jurisdiction has no authority or power to re-open the ruling of 4th March, 2011 to consider whether or not it ought to have made the contested finding. That is a matter that can only be taken up on appeal. I find no merit in this prayer seeking orders or review and I decline to grant the same.

COSTS

The Ex-Parte applicant also challenged the decision of the High Court to award costs to the Interested Parties in the ruling of 4th March, 2011.

Section 27(1) of the Civil Procedure Act Cap 21 Laws of Kenya provides

> ***"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the events unless the court or Judge shall for good reason otherwise order"***

As a general principle in law costs of litigation will follow the cause. Therefore the party who succeeds will ordinarily be awarded the costs of the suit. However, the decision of whom to award costs remains the discretion of the trial court. The discretion to award costs must be exercised judiciously. In cases where a court decides to depart from the general principle and awards costs to a party other than the successful party then reasons must be given. If the court fails to justify such a decision then that award of costs may be set aside. (see **JOSEPH ODUOR ANODE Vs KENYA RED CROSS SOCIETY [2012] eKLR and JASBIR SINGH RAI & 3 OTHERS Vs TARIOCHAN SINGH RAI & 4 OTHERS 2014 eKLR)**

I have no doubt that the Honourable trial Judge was fully aware of the law and he must have been fully aware of the legal principles on award of costs when he exercised his discretion in favour of awarding the costs to the Interested Parties. Once again I find that this does not amount to an error of the law, and cannot be the subject to review by a court of concurrent jurisdiction. In **NATIONAL BANK OF KENYA LIMITED Vs NDUNGU NJAU Civil Appeal No. 211 of 1996** the Court of Appeal held

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".*** (own emphasis)

This finding was affirmed in **PANCRAS T-SWAI Vs KENYA BREWEIES LIMITED [2014]eKLR** where it was held

> ***"The High Court is presumed to know the law that is why the constitution has conferred on the High Court in Article 165(3) (a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3) (a) jurisdiction to develop the law and in Article 20(3) (b) the mandate to***

interprete the Bill of Rights ….. The Appellant's fight to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law at all".

This is the question of whether the court in its ruling of 4th March 2011 exercised its discretion in awarding costs rightly or wrongly cannot be a matter for review. Further the question of whether the court erred in awarding costs to the Interested Parties without giving reasons is a question that can only be determined by an appellate court.

Counsel for the Ex-Parte applicants in his submissions relied on the case of **KENYA MARITIME AUTHORITY Vs PATRICK MUTUA MBITHI 2012eKLR**, where **Hon. Lady Justice Mary Kasango** held that the court in awarding costs to an unsuccessful party had made an error. The learned Judge held that this was only a mistake and did not amount to a misconstruction of the law. However I find that case distinguishable from the present one in that from the body of that ruling it is quite apparent that the Honourable Judge did intend to award costs to the Interested Parties. This was neither a mistake nor an omission.

Based on the foregoing I find that the ruling of 4th March, 2011 did not contain any errors capable of correction by way of review. Consequently I do dismiss the Notice of Motion dated 25th July 2011 in its entirety with costs to the interested parties.

Dated in Nakuru this 21st day of March 2017

Maureen A. Odero

Judge