



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO. 5 OF 2015

IN THE MATTER OF SECTION 84(1) (2) OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70(A), 71(1) (2) 72(1) 73(1), 74(1) 75(1) 76(1) 77(4), (9), 78(1) 79(1) 80(1) 82(1), 107, 114 & 123(8) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LEGAL NOTICE NO. 6 OF 2006 ARTICLE 11, 12, 20 & 21

AND

IN THE MATTER OF HIGH WAY AND PUBLIC ROADS AUTHORITY ACT (CAP) LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT, (CAP) 300 LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT (CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT (CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT (CAP 265) LAWS OF KENYA

AND

IN THE MATTER OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT (CAP 21) LAWS OF KENYA

BETWEEN

WILLIAM NJUGUNA MAGONDUPETITIONER

VERSUS

THE DISTRICT LAND REGISTRAR KIRINYAGA DISTRICT.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA2ND RESPONDENT

THE DISTRICT COMMISSIONER KIRINYAGA DISTRICT.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

AND

JAMES MUNENE NDUMBI1ST INTERESTED PARTY

NJUGUNA MIANO2ND INTERESTED PARTY

RULING

On 18th September 2015, this Court delivered a judgment striking out with costs the petitioner's petition filed herein on 28th April 2010 for being res-judicata. The Court nonetheless considered the merits of the petition and found that none of the petitioner's rights to the plot No. 2 (77) KAGUMO-KERUGOYA at KAGUMO Market had been violated by the respondents.

Aggrieved by that judgment, the petitioner filed a Notice of Appeal dated 29th September 2015 and on 1st October 2015 filed a Notice of Motion seeking a review of the judgment and orders issued on 18th September 2015. The following provisions are cited:-

(1) Articles 19, 22, 25 (c) 50 (1) and (2) 159 (2) (d) and 259 of the Constitution

(2) Sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act

(3) Order 45 Rules 1, 2, 3 and 4 of the Civil Procedure Rules.

The said application is based on the grounds set out therein and supported by the affidavit of **WILLIAM NJUGUNA MAGONDU** the applicant herein. From my reading of the application and the supporting affidavit, the following are the salient grounds upon which the said Notice of Motion and which is the subject of this ruling is based:-

(1) That there are sufficient reasons to warrant a review since this was a Constitutional Petition and under Article 22 of the Constitution, it does not attract costs.

(2) That plot No. 77 KAGUMO MARKET was lawfully allocated to the petitioner by the 2nd respondent in 1961 as a village plot but was later converted to a commercial plot.

(3) That there is an error of law on the face of the record and misapprehension.

(5) That the original petition has not been traced and the petitioner only knew about the judgment recently.

(6) That Article 159 (2) (d) of the Constitution obligates the Court to dispense justice without undue regard to technicalities and the overriding objective is to hear cases on merits to facilitate a just, expeditious, proportionate and affordable resolution of disputes.

(7) That the Court has overriding powers and unfettered discretion to cure any defects, breaches and/or mistakes for the larger objective of justice.

(8) That it is in the interest of justice and equity that the judgment delivered on 18th September 2015 be reviewed.

Annexed to the application, as is required, is the decree arising from this Court's judgment sought to be reviewed.

The interested parties and the 2nd respondent have filed grounds of opposition to the said application.

In their grounds of opposition, the interested parties have argued, inter alia, that the application is bad in law, a gross abuse of the process of the Court, frivolous and vexatious and lacks merit. That the same is not warranted and amounts to lodging an appeal against this Court's judgment. That the application does not raise sufficient grounds to warrant a review and that costs follows the event and are a matter of the Court's discretion.

The 2nd respondent in its grounds of opposition raises similar issues to those raised by the interested parties and urges this Court to bring this litigation to an end.

The Notice of Motion was canvassed by way of written submissions which have been filed by counsel for the petitioner, the two interested parties and the 2nd respondent.

I have considered the application, the grounds of opposition and the submissions of counsel.

I must start by stating that I do not see the relevance of the Constitutional provisions cited in support of this application many of which are really out of context. It is instructive to note that this petition was filed in April 2010 some four months before the coming into force of the Constitution of Kenya 2010. That notwithstanding, however, it is not clear how, for instance, ***Article 22 (3) (c of the Constitution)*** which deals with the issue of filing fees can be relevant to this application.

This application seeks to review this Court's judgment dated 18th September 2015 and the decree that followed. ***Section 80 of the Civil Procedure Act*** which is among the provisions cited by the petitioner provides as follows:-

“Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit”

Order 45 Rule 1 of the Civil Procedure Rules which has also been cited and which is relevant for purposes of this application provides as follows:-

“Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for

any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”.

It is settled law that grounds upon which a party may seek a review of a judgment are:-

(1) Discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced at the time the decree or order was being passed

(2) Mistake or error apparent on the face of the record.

(3) Any other sufficient reason.

Failure to apply the law is not a ground for review but is a ground for appeal – **SWAI VS KENYA BREWERIES C.A CIVIL APPEAL No. 275 of 2010 NAIROBI.**

Looking at the application herein, does it really satisfy the requirements of **Section 80 of the Civil Procedure Act** or **Order 45 (1) of the Civil Procedure Rules**? My view is that it does not do so for the following reasons:-

- The petitioner alludes to sufficient reasons, an error of law and misapprehension of evidence but does not identify these issues either from the judgment or decree sought to be reviewed. In paragraph 10 of his supporting affidavit, the petitioner avers as follows:-

“That the original petition has not been traced as shown by the exhibit herein attached and marked WNM 3”

It is true that on 11th November 2014 as I was in the process of writing the judgment in this petition, I noticed that the petition itself was missing from the file which had initially been registered at the High Court in Embu before being transferred to this Court. I therefore directed the Deputy Registrar to write to the petitioner’s advocate with a copy to the other parties to avail the petition. The Deputy Registrar complied and by a letter dated 14th November 2014 ref JUD/KER/HC JR 25/13 wrote to M/S Ondieki and Ondieki Advocates for the petitioner to avail a copy of the petition. The letter was copied to counsel for the respondents and interested parties. It was not until 12th March 2015 that a copy of the petition was availed to the Court and confirmed by counsel who attended Court. It is not suggested that the said petition which is stamped as having been received in this Court’s registry on 6th January 2015 is not the correct petition. It was only after receiving the petition that this Court fixed a judgment date. In my judgment sought to be reviewed, I have referred to the orders sought and the petitioner’s supporting affidavit. It cannot therefore be correct, as suggested by the petitioner, that the petition was not traced. How else would the Court write a judgment without reference to the petition? That is clearly not possible and does not aid the petitioner herein in his application.

It is the petitioner’s case that this Court has a duty to do justice without undue regard to technicalities and has unfettered discretion to cure defects. That is correct. However, nothing has been placed before me to suggest that this Court was unduly concerned with technicalities or that it did not exercise a judicial mind. When the matter first came up before me on 19th February 2013, counsel for the petitioner suggested that the same be canvassed by way of written submissions which was agreed upon and submissions were duly filed. Hearing of cases by way of written submissions is allowed under the law and indeed the Constitution of Kenya (**Protection of rights and fundamental freedoms**) **Practice and Procedure Rules** provide for such a procedure. The petitioner was able to file all the documents in support of his petition. I do not therefore see how **Article 50 of the Constitution** was violated or how the petition was not heard on its merits. Indeed although this Court was satisfied that the petition was res-judicata, I still considered its merits which I found lacking.

The petitioner further adds that he only knew about this judgment recently. Apart from this not being a

ground for review, he does not even say when he knew about the judgment. It is clear from the record that the judgment was due on 14th May 2015 but I was bereaved and all parties were notified by the Deputy Registrar vide his letter dated 9th September 2015 under ref JUD/KER/PET/5/15 that the same would be delivered on 18th September 2015. It was duly delivered on that day in the absence of the petitioner's advocate and that of the respondent although the interested parties were represented. Having been notified, it was the responsibility of counsel and the petitioner to attend. It is not suggested that they did not receive the notice issued by the Deputy Registrar. There is an explanatory note dated 18th September 2015 explaining the delay in delivering the judgment and expressing this Court's regret. In any case, this application was filed barely two weeks after the delivery of this Court's judgment and it has not been an issue that there was any unreasonable delay in doing so.

Perhaps the only serious issue that merits this Court's consideration is that of costs. In paragraph 6 of his supporting affidavit, the petitioner has deponed as follows:-

“That this was a Constitutional Petition and under Article 22 of the Constitution, it does not attract costs”

Both ***Rule 26 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*** and ***Section 27 of the Civil Procedure Act*** reiterate that costs are at the discretion of the Court. Costs follow the event unless the Court, for good reasons, decides otherwise. This petition was struck out primarily because it was res-judicata as the same issues had been the subject of a previous consent order involving the petitioner. In striking out the petition, I addressed myself as follows:-

“As stated earlier, the petitioner has admitted that the suit plot was also the subject matter in KERUGOYA PMCC No. 34 of 1990 in which he was misled into signing a consent. His option was to have the said consent set aside on grounds that it was obtained fraudulently. He did not do that and has instead moved this Court vide a Constitutional Petition alleging a violation of his rights. That, in my view, is a clear abuse of the Court process and is sufficient ground upon which this Court should strike out the petition”.

Having made a finding that the petition was an “***abuse of the Court process***”, there would really be no good reason upon which to deny the respondents and the interested parties their costs. It is generally accepted that a principal consideration in the discretion to award or deny costs is where the pleading amounts to an abuse of the Court's process. A party who drags another to Court to defend such pleadings must be ready to meet the costs of such a cause. Similarly, the Court may take a more lenient view if the litigation was in public interest. In ***JASBIR SINGH RAI & 3 OTHERS VS TARLOCHAN SING RAI & 4 OTHERS (2014) e K.L.R.***, the Supreme Court held as follows:-

“The claims of the Public interest will be a relevant factor in the exercise of such discretion, as will be the motivation and conduct of the parties prior to, during and subsequent to the actual process of litigation”

In the circumstances of this petition, not only was the suit an abuse of the Court process but also, there was really no claim of Public interest. The order of costs against the petitioner was clearly merited.

Finally, the petition, as I have indicated above, was struck out for being res-judicata. The doctrine of res-judicata applies in Constitutional Petitions just as it does in other civil cases although only in the clearest of cases – ***JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER VS CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS C.A CIVIL APPEAL No. 42 of 2014 (MALINDI)***. This was one such case where I found the principle applicable. And even if I did not apply that principle of law properly, that failure, if any, would be on a point of law which can only be a good ground for appeal but not a ground for review – ***SWAI VS KENYA BREWERIES LTD*** (supra).

In the circumstances therefore, having considered the petitioner's Notice of Motion dated 29th September

2015 and filed herein on 1st October 2015, I find it devoid of merit. It is accordingly dismissed with costs to the 2nd respondent and the interested parties.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Ruling dated, signed and delivered in open Court this 30th day of September 2016.

Mr. Mwangi for Mr. Ondiek for Applicant present

Mr. Muturi for Mr. Kiarie for 2nd Respondent present and also holding brief for Mr. Kahiga for the Interested parties.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016