



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL MISC. CASE NO. 3 OF 2012 (JR)

**IN THE MATTER OF AN APPLICATION BY MICHAEL THIONGO GATETE FOR
JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW REPEALED)

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL (KEUMBU DIVISION)

AND

IN THE MATTER OF KISII CMCC MISC. APPLICATION NO. 120 OF 2011

BETWEEN

MICHAEL THIONGO GATETE..... APPLICANT

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

KIOGORO LAND DISPUTES TRIBUNAL 2ND RESPONDENT

THE CHIEF MAGISTRATE COURT – KISII 3RD RESPONDENT

AND

DAVID MACHUKA ONTONYI

NAFTALI MABEYA ONTONYI INTERESTED PARTIES

RULING

1. At all material times, the applicant herein Michael Thiongo Gatete was registered as the proprietor

- of all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/403** (hereinafter referred to as “**Plot No.403**”) which has since been sub-divided into two portions namely, **LR Nos. Nyaribari Chache/B/B/Boburia/9633 and 9634** (hereinafter referred to as “**the suit properties**” where the context so admits). Sometimes in the year 2011, the interested parties lodged a claim against the applicant with the 2nd respondent claiming that the applicant had acquired title to Plot No. 403 irregularly. In a ruling that was delivered on 11th November, 2011 after hearing the interested parties and the applicant together with their respective witnesses, the 2nd respondent made a finding that the applicant had obtained title to Plot No. 403 fraudulently and ordered the applicant to surrender the property to the interested parties.
2. The applicant was aggrieved by the said decision and moved this court through Chamber Summons application dated 30th January, 2012 for leave to apply for judicial review in the nature of certiorari and prohibition to quash the said decision and to prohibit the execution thereof. The applicant’s application for leave was heard by Sitati J. on 31st January, 2012 who allowed the same conditionally. The applicant was granted leave to apply for orders of certiorari and prohibition on condition that he deposits in court as security for costs a sum of Ksh.100,000/= within 10 days from the date when the order granting leave was made.
 3. The applicant was not satisfied with the said condition and decided to seek a review of the same. This is what prompted the Chamber Summons application dated 7th February, 2012 which is the subject of this ruling. The application was brought under Order 53 Rule 1 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya. The applicant sought the following orders;
 - a. **That the Honourable Court be pleased to vary its orders made on the 31st day of January 2012 particularly order 5 requiring the applicant to deposit kshs. 100,000/= being security for costs. That instead the Honourable Court be pleased to order that the applicant herein do give an undertaking as to costs, or security to be deposited in court of equivalent amount.**
 - b. **That the costs of this application be provided for in favour of the applicant herein in any event.**
 4. The application was supported by the affidavit of the applicant in which he deposed that he was at all material times the registered proprietor Plot No. 403 which has since been subdivided into two portions namely, Plot No.9633 and Plot No. 9634 (the suit properties) and that he is unable to raise the sum of Kshs. 100,000/= that he was ordered by the court to deposit as security due to other financial commitments. The applicant deposed that he is ready to give an undertaking as to costs and in the alternative any other form of security equivalent to Ksh. 100,000/=. The applicant deposed that unless the orders sought are granted, he would be locked out of the seat of justice with the result that he will lose the suit properties.
 5. The application was opposed by the interested parties through a replying affidavit sworn by the 2nd interested party on 2nd March 2012. The interested parties contended that the condition that was imposed by the court while granting leave to the applicant was fair and just in the circumstances. The interested parties contended further that the applicant has not given plausible reason why he has not and should not comply with the said condition. The interested parties contended that the applicant is in breach of the order that required him to furnish security and as such his application should be dismissed and the order of stay of proceedings that was granted in his favour together with leave discharged.
 6. When the application came up on 6th March 2012, the parties agreed to argue the same by way of written submissions. The parties filed their respective submissions and the same are on record. I have considered the application together with the supporting affidavit. I have also considered the replying affidavit filed by the interested parties in opposition thereto. Finally, I have considered the submissions filed by the advocates for both parties and the case law cited in support thereof. The only issue that arises for determination is whether the applicant is entitled to the review sought.
 7. The applicant’s application as I have stated above was brought under Order 53 rule 1 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act, Cap.26 Laws of Kenya. I am of the view that the provisions of the Civil Procedure Rules and the Law Reform Act which have been

cited by the applicant as the basis for his application do not confer upon this court power to grant the orders sought by the applicant. I am of the opinion that the applicant's application should have been brought under Order 45 of the Civil Procedure Rules. Order 45 rule 1 provides that, a person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is 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 an 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 such decree or order without unreasonable delay.

8. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal at Nairobi, Civil Appeal No. 211 of 1996** (Unreported) the Court of Appeal stated that:

“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.”

In the case of, **Nairobi City Council –vs- Thabiti Enterprises Ltd, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1996** (unreported), it was stated that:-

“The current position would then, appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason.”

9. The order sought to be reviewed was made under Order 53 rule 1 (3) of the Civil Procedure Rules which gives the court power while granting leave to impose such terms as to costs and as to the giving of security as deemed fit. The applicant has contended that the amount of security set by the court is beyond his means. He has contended that he is not opposed to the order of security. His problem is with the nature of security which requires cash deposit. He has proposed a security in the form of an undertaking or in the alternative any other form of security which is equivalent to a sum of Ksh. 100,000/=. He has contended that since leave that was granted to him was conditional upon him furnishing security that was ordered by the court, his failure to come up with security which is not of his own making would result in him not being able to pursue his application for judicial review. He would have therefore been denied access to justice.
10. I have noted that the order for security was made by the court ex parte of its own motion. The court was of course within its power to make the order since applications for leave are normally heard ex parte. Article 48 of the Constitution of Kenya provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 159(2) (e) of the Constitution provides that when exercising judicial authority, this court shall ensure among others that the purpose and principles of the constitution are protected and promoted. In the case of **Peter Odiwour Ngoge t/a OP Mogege & Associates Advocates & 5379 Others –vs- J Namada Simon t/a Namada & Co. Advocates & 725 others [2014] eKLR** the court stated that **“the judiciary is the ultimate custodian of the constitution, in which the Bill of rights is enshrined. This court as the apex court is bound to ensure that the people's right to access to justice is not curtailed.”**
11. As I have stated above, the order for security for costs was made by the court ex parte on the court's own motion. The applicant had no opportunity to address the court on the alternative forms of security that he could furnish. Cash deposit is not the only form of security that the court can order under Order 53 rules 1(3) of the Civil Procedure Rules. Now that it has turned out that the applicant cannot raise a cash deposit of Ksh. 100,000/= but is willing to give an alternative form of security, I am satisfied that the applicant has shown sufficient reason that would justify the review of the order made herein on 31st January, 2012. The consequences that would flow if the court was to insist on cash deposit of Ksh.100,000/= would violate the applicant's right to access

justice. This is not to say that an order for security for costs cannot be made. The point is that the order should be such that it would not impede access to justice. I am of the view that an order for security of costs that gives the person against whom the order is made no option in terms of the security to be furnished may impede access to justice where non-compliance would result in the termination of the person's case without a hearing.

12. For the foregoing reasons, I will allow the applicant's application dated 7th February, 2012 and set aside part of the order that was made on 31st January, 2012 relating to the furnishing of security. In place thereof, I order that the applicant shall deposit in court within thirty (30) days from the date hereof a sum of Kenya Shillings Fifty Thousand (Ksh.50,000/=) and the original title deeds for LR Nos. Nyaribari Chache/B/B/Boburia/ 9633 and 9634 as security for costs failure to which the leave that was granted herein conditionally on 31st January, 2012 together with the order of stay of proceedings shall stand discharged. The application for judicial review if any has been filed shall also stand dismissed with costs to the interested parties. The cost of the application shall be in the cause.

Delivered, Signed and Dated at Kisii this 17th day of April 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Moracha h/b for Mokuia for the applicant

N/A for the respondents

Mr. Omwega interested parties

Mr. Mobisa Court clerk

S.OKONG'O

JUDGE