



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
JUDICIAL REVIEW NO. 7 OF 2008

REPUBLIC APPLICANT

-VERSUS-

**CHAIRMAN PROVINCIAL LAND DISPUTES APPEAL TRIBUNAL RIFT VALLEY
PROVINCE**

UASIN GISHU DISTRICT 1ST RESPONDENT

LAND REGISTRAR 2ND RESPONDENT

VERSUS

CHRISTOPHER CHEBII EX PARTE APPLICANT

BENARD OSEWE ODONGO INTERESTED PARTY

RULING

1. The Exparte Applicant moved this court by way of a Notice of Motion dated 4th June, 2008 in which he sought two substantive orders namely, an order of certiorari to quash the 1st Respondent's verdict/decision dated 30th October, 2007 and an order of mandamus directing the 2nd Respondent to register the Ex-parte Applicant (hereinafter referred to as Mr. Chebii) as the owner of land parcel Mile 13 Scheme Plot No. 116 measuring 1.0 acres and to issue a title deed in his favour.
2. The background against which this application was filed is important. It is apparent from the court record that both Mr. Chebii and the interested party claim ownership of a parcel of land known as Plot No. 116 situated at Mile 13 measuring 1.0 acres.

According to Mr. Chebii, he purchased the said parcel of land in 1989 from Philemon Kiplagat at a consideration of Kshs.23,000/-. He later sold the land to Rosaline Anguka at a price of Kshs.38,000/- but he repurchased it from her at a cost of Kshs. 50,000/- in 1995. Thereafter, the interested party made a claim over the land. The dispute found its way to the Turbo land Disputes Tribunal and after its deliberations, the tribunal resolved that the said parcel of land belonged to Mr. Chebii. The decision of the tribunal was adopted as an order of the chief magistrate's court at Eldoret as shown by the decree issued on 2nd December, 2015.

3. The interested party was aggrieved by the tribunal's verdict and he appealed to the Rift Valley

Provincial Lands Disputes Tribunal (1st respondent). By its decision dated 30th October, 2007, the 1st respondent reversed the decision of the Turbo Land Disputes Tribunal and held that the suit land belonged to the interested party and not Mr. Chebii. It is this decision that provoked the institution of judicial review proceedings through the Notice of Motion dated 4th June, 2008.

4. After hearing all the parties in the proceedings, the court in its judgment delivered on 5th June, 2013 allowed the prayer for an order of certiorari and quashed the decision of the 1st respondent dated 30th October, 2007 but declined to issue an order of mandamus directing the 2nd respondent to issue a title deed for the suit land in favour of Mr. Chebii for reasons contained in the judgment.

In addition to the two orders, the court went further to express itself as follows:-

“Having quashed the decision made on 30th October, 2007, this court finds that the matter is re-opened before the provincial Land Disputes Appeals Committee....”

The applicant has now applied to have the aforesaid decision of the court reviewed in his notice of motion dated 16th September, 2013 which is the subject of this ruling.

5. The application is expressed to be made under **Order 45 and 51** of the **Civil Procedure Rules, Sections 1A, 1B, 3, 3A** and **Section 80** of the **Civil Procedure Act**.

It is premised on the following grounds:-

- i. That there is an error and/or mistake apparent on the face of the record.
- ii. That judgment was delivered on 5th June, 2013 quashing the 1st respondent’s decision.
- iii. That the court ordered the matter to be reopened before the provincial land disputes appeals committee.
- iv. That however, the provincial land disputes appeals committee does not exist, the land disputes tribunal having been abolished.
- v. That the ex parte applicant herein is likely to take advantage of the scenario above and begin dealing with suit land at the detriment of the interested party herein.
- vi. It is imperative that the decision herein be reviewed to put the record straight and to give a clear way forward for the parties herein to pursue.
- vii. That there is no prejudice that will be occasioned to the ex parte applicant herein if this application is allowed.

The application is supported by an affidavit sworn by the interested party/Applicant on 16th September, 2013 in which he reproduced the grounds on which the application is anchored.

6. The application is not opposed by the Respondents but it is opposed by the Ex parte Applicant. In opposition to the application, Mr. Chebii filed both grounds of opposition and a replying affidavit.

The gist of Mr. Chebii’s opposition to the application is mainly that the application was devoid of merit and ought to be dismissed for the following reasons:-

That there is no fundamental mistake on the face of the court’s record or its decree issued on 18th June, 2013; that the application is frivolous and vexatious aimed at abusing the court process; that this court had no jurisdiction to review or stay orders issued in judicial review as such orders are

final and are only subject to an appeal under **Section 8(5)** of the **Law Reform Act**; that allowing the application will be tantamount to usurping the powers of the Court of Appeal; that **Section 80** of the **Civil Procedure Act** (the **Act**) and **Order 45** of the rules do not apply to judicial review orders and that allowing the application as prayed would occasion prejudice and irreparable harm to him.

7. By consent of the parties, the application was prosecuted by way of written submissions; those of the applicant were filed on 29th April, 2015 while those of the Exparte Applicant were filed on 12th March 2015. The respondents were the last to file their submissions on 30th June, 2015.

Learned counsel for the interested party in his submissions while relying on several authorities laid down the conditions which must be satisfied by a party seeking review of court orders as prescribed under **Section 80** of the **Act** and **Order 45** of the **Civil Procedure Rules** (the Rules) which are the following:-

- i. When a party has not appealed or is not allowed to appeal.
- ii. When there is new evidence.
- iii. When there is an error or mistake apparent on the face of the record.
- iv. When there is an omission on the part of the record or
- v. For any other sufficient reason.

Counsel submitted that the applicant has met the requirements for review as he had not lodged an appeal against the orders sought to be reviewed and that in this case, there was a mistake on the face of the record as the Provincial Land Disputes Appeals Committee no longer existed.

8. Counsel further submitted that this court had jurisdiction to review its orders even those made in judicial review in the exercise of its inherent jurisdiction in order to correct its own mistake where it is shown that such a mistake was remediable by the court; that whether or not to review the courts earlier orders is a matter of judicial discretion which should be exercised when it is necessary to meet the ends of justice or where it will serve a useful purpose.

For this proposition, counsel placed reliance on the following authorities;

Nakumatt Holdings Ltd V Commissioners of Value Added Tax [2011] eKLR; Nassir Abdi V Ali Wano & 2 others [2013] eKLR; R V Cabinet Secretary for Transport and Infrastructure and 6 others [2015] eKLR and Republic VS Anti-counterfeit Agency & 2 others Exparte Surgipharm Ltd [2014] eKLR.

9. On behalf of the Exparte Applicant, it was submitted that the application lacked merit and ought to be dismissed as this court lacked jurisdiction to review judicial review orders. Mr. Chebii contended that **Section 80** of the **Act** and **Order 45** of the **Rules** are not applicable to judicial review orders and that the decision sought to be reviewed was only subject to an appeal to the Court of Appeal under **Section 8(5)** of the **Law Reform Act**. For this proposition, he relied on the authority of ***Republic VS Clerk County Council of Meru [2012] eKLR.***
10. In his submissions, learned State counsel **Mr. D.O Wabwire** appeared to have been mistaken about the application which was pending ruling. He filed submissions in respect of the Notice of Motion dated 4th June 2008 instead of the one dated 16th September, 2013. The said submissions are therefore irrelevant to the application under consideration.
11. I have considered the application, the affidavits filed by the parties, the submissions made by the parties and all the authorities cited. I find that the only issue arising for my determination is whether the High Court has jurisdiction to review orders of judicial review once rendered.

It is important to note that the application has been made within judicial review proceedings and that in such proceedings; the court exercises a special jurisdiction which is neither Civil nor Criminal. It is a jurisdiction which has been described as a jurisdiction sui generis in which the civil procedure Act or any other law is not applicable.

12. It is trite that the only law applicable to judicial review proceedings is the **Law Reform Act** being the substantive law and **Order 53** of the **Rules** promulgated under powers donated by **Section 9** of the **Law Reform Act** being its exclusive procedural law. See: **Republic V Chairman Amagoro Land Disputes Tribunal & Another Ex parte Paul Mafumbi Wanyama Civil Appeal No. 41 of 2013 [2014]eKLR**; **The Commissioner of Lands V Kunste Hotel Ltd Civil Appeal No. 234 of 1995 [1997] eKLR** ; **Jotham Mulati Welamondi vs Electoral Commission Kenya Bungoma High Court Misc. Application NO. 81 of 2002.**

I therefore agree with the submissions made on behalf of Mr. Chebii that **Section 80** of the **Act** and **Order 45** of the **rules** do not apply to judicial review proceedings.

13. The court's jurisdiction in judicial review is donated by **Section 8** and **9** of the **Law Reform Act** and the manner in which that jurisdiction is exercised is governed by **Order 53** of the **Rules**. It is worth noting that neither the **Law Reform Act** nor **Order 53** contains a provision allowing the court to review its orders made in judicial review.

Section 8 (3) of the **Law Reform Act** provides that orders made in Judicial review are final and are subject only to the right of appeal to the court of appeal as provided under **Section 8(5)** of the same Act.

14. It is evident from a plain reading of **Section 8(3)** and **8(5)** of the **Law Reform Act** that this court does not have jurisdiction to review its orders or decisions made in the exercise of its judicial review jurisdiction. But the law on this jurisdictional issue is not yet settled. There are two conflicting pronouncements from the Court of appeal on this point. The Court in **Biren Amritlal Shah & another V Republic and 3 others Civil Appeal No. 186 of 2004 (2013) eKLR** held that in view of the provisions of **Section 8(3)** and **8(5)** of the **Law Reform Act**, this court did not have jurisdiction to review its previous judicial review orders. But in an earlier decision in **Nakumatt Holdings Limited V Commissioner of Value added Tax (2011)eKLR**, the Court of Appeal had made a different decision. The court held that the High Court had residual power to correct its own mistake in the exercise of its inherent jurisdiction where such a mistake is remediable by the court. The court expressed itself in the following terms;

“Mr. Ontweka, for the respondents in his submissions to us, seemed to suggest that where a law is silent on whether review is permissible, the courts must decline jurisdiction where a review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is, otherwise, not to blame for the circumstances he finds himself in. This court in the case we earlier cited of Aga Khan Education Services Kenya v R. (supra) expressed the view, that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear-cut cases.”

Ondunga J in **Republic Vs Anti-Counterfeit Agency & 2 others Ex parte Surgipham Ltd (Supra)** and in **Republic V Cabinet Secretary for transport & infrastructure & 6 others (Supra)** followed the Court of Appeal's decision in the **Nakumatt Holdings Ltd case (supra)**. He held that this court in the exercise of its inherent powers had jurisdiction to grant orders reviewing or setting aside judicial review orders.

15. I wholly associate myself with the position taken by my brother Odunga J because the inherent jurisdiction of the court is not dependant on statutory provisions. It is a residue power which the court exercises to ensure that the ends of justice are met in every case or to prevent abuse of its

process. It is this power that the court invokes to administer substantive justice in its adjudication of disputes as required in the new constitutional dispensation.

16. That said, I now turn to the applicant's prayer for review in this case.

The applicant seeks that this court be pleased to review the decree issued on 18th June, 2013. According to the decree which the applicant attached to his affidavit as annexure 1, the court made three orders namely an order of certiorari quashing the 1st respondent's decision; an order declining to grant an order of mandamus to compel the Land Registrar to issue a title deed in favour of the Exparte Applicant and an order that the hearing of the dispute between the parties be re-opened for hearing before the 1st Respondent.

17. From the manner in which the application is crafted and the submissions made by the parties, it is clear that what the applicant is inviting the court to review is the last order requesting the re-opening of the matters in question before the Provincial Appeals Tribunal (1st respondent). The applicant contends that there is an error apparent on the face of the court record because at the time the order was made, the tribunal had ceased to have legal existence.

18. It is not disputed that the 1st respondent was one of the organs which had been established under the **Land Disputes Tribunals Act**. This piece of legislation was repealed by the **Environment and Land Court Act** which came into force on 30th August 2011. This means that all Land disputes Tribunals including the 1st respondent ceased to exist on 30th August, 2011.

The order sought to be reviewed was made in a judgment delivered on 5th June, 2013. In the premises, I agree with the applicant that there is an error apparent on the face of the court record since at the time the order was made, the tribunal had ceased to exist and was no longer available to reconsider the matter referred to it by the court.

19. This is no doubt an error which can be reviewed by this court in the exercise of its inherent jurisdiction by vacating the said order since doing so will not prejudice any party and in any event the order does not serve any purpose.

I consequently allow the application by vacating the order stated in the following terms:-

"This matter is re-opened before the Provincial Land Appeals Committee".

As stated earlier, the applicant did not specifically seek a review of the other orders in the decree and even if he had, I would not have had any reason to review them. The said orders therefore remain intact.

20. Before I conclude, it is worth noting that the applicant had invited the court to give the parties a clear way forward to pursue in this matter. But it is not the duty of the court to advise parties on how to conduct their cases. The best that I can do is to advise them that it is now open for them to take whatever course of action they may consider necessary.

21. On costs, I order that each party will bear his own costs.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th day of July 2015

In the presence of:-

Ms Matoke for the Exparte Applicant

Mr. Mwinamo holding brief for Mr. Wabomba for the interested party/applicant

Mr. Kuria for the Respondents

Mr. Lesinge Court clerk