



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISCELLANEOUS CASE NO. 68 OF 2017

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT, 2011,

THE LAND REGISTRATION ACT, 2011 AND THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF: THE PRINCIPAL MAGISTRATES COURT AT KAJIADO

CASE NO. L.D.T.NO. 30 OF 2012,

REPUBLIC.....APPLICANT

BETWEEN

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE LAND DISPUTE TRIBUNAL, KAJIADO NORTH - DISTRICT.....2ND RESPONDENT

THE PRINCIPAL MAGISTRATE COURT, KAJIADO.....3RD RESPONDENT

THE DISTRICT LAND REGISTRAR, KAJIADO.....4TH RESPONDENT

AND

PHILIP OLTINKA MOKOPE.....INTERESTED PARTY

EX-PARTE DAVID MUTHAMI MUTHEE.....EX-PARTE APPLICANT

RULING

This ruling is on the Notice of Motion dated 12/2/2020. The said Motion which is brought under **Order 45 Rules 1, 2 and 3 (2)** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law has one main prayer which is,

That the Court be pleased to review and/or vary the *Order of 25/9/2017*, dismissing the suit for want of prosecution.

The main ground for seeking the above order is that there is a pending Application dated 1/7/2013 filed by the Interested Party which has never been heard and the dismissal of the suit is prejudicial to the Ex Parte Applicant as he enjoys orders herein.

The application is supported by an affidavit sworn by the applicant in which he says that his former Counsel was not served with the Notice to Show Cause dated 17/7/2017.

The application though served is not opposed by the Respondents or the Interested Party.

I have carefully considered the application including the grounds, the affidavit, the annexures and the submissions dated 26/3/2021.

Firstly, I find that the application has been brought under the wrong provision of law.

Order 45 of the **Civil Procedure Rules** deals with review. Review is limited to the grounds listed in **Order 45 Rule 1 Proviso** which provides;

“Any person considering himself aggrieved-

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

(b) by a decree or order from which no appeal is hereby allowed, and who on 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 reasons, desires to obtain 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”.

None of the above applies to this case.

The suit having been dismissed under **Order 17 Rule 2(1) Civil Procedure Rules**, the proper Order for reinstatement would have been **Order 12, Rule 7 Civil Procedure Rules** which applies by virtue of **Order 17 Rule 3 Civil Procedure Rules** provides as follows:

“Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit”.

Order 12 Rule 7 provides;

“Where under this order Judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgement or order upon such terms as may be just”.

Secondly, failure to cite the correct provision of law is not fatal to the application since there is the blanket ***“All other enabling provisions of law”*** that the application has also been brought under.

Thirdly, the dismissal of the suit on 25/9/2017 did not affect the current order dated 17th May, 2013 between the Ex-Parte Applicant and the Respondents.

Finally, the dismissal of the suit only applied to the Interested Party’s Notice of Motion dated 1/7/2013.

For the above stated reasons, there is no need to disturb the dismissal order dated 25/9/2017 because Ex-Parte applicant’s interests are secure and there ought to be finality in litigation.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 28TH DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE