REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 160 OF 2007

JOSEPH CHERUIYOT

PETER NGETICH AND

KIMORONG MIBEI ….................................. APPELLANTS/RESPONDENTS

=VERSUS=

WILSON BUSIENEI & 19 OTHERS …............ RESPONDENTS/APPLICANTS

RULING

The application before me seeks the Review and setting aside of the Ruling and Order made on 7th August, 2013. It also asks this court to grant orders in terms of the application dated 10th January, 2008.

The main ground for seeking a review of the Ruling and the Order made on 7th August, 2013, was that there was a mistake or error apparent on the face of the record.

The Ruling and the Order are said to be based on a mix-up of issues. Therefore the applicant believes that if the court had addressed its mind properly, the Ruling and order that it would have given would have been different.

Mr. Kuloba, the learned advocate for the Applicant, submitted that whereas the application which gave rise to the Ruling dated 7th August, 2013, was dated 29th January, 2007, the Ruling itself made reference to an application dated 8th January, 2007.

He pointed out that those two applications were not at all similar. He explained that the application which was then in issue, (which is dated 29th January, 2007), was for the execution of the Decree as set out on its terms.

In contrast, the application dated 8th January, 2007, was said to have been for the interpretation and the correction of the Award.

The Applicant asked this Court to review the Ruling and the Order made on 7th August, 2013, by finding that the Appellants required leave of the court before they could file an appeal arising from the decision of the Magistrate's Court.

In answer to the application, **Mr. Nyachiro,** the learned advocate for the Respondents, submitted that the application was fatally defective because the Order sought to be reviewed was not attached to the

application.

The Respondents also submitted that there was no error apparent on the face of the record.

The learned Judge was said to have made the wrong exposition of the law. However, such a mis-construction of the statute was said to be incapable of review.

As far as the Respondents were concerned, where a Judge made an error in his interpretation of the law, the only remedy would be an appeal.

The error which the Judge is alleged to have made was her finding that the application fell under the provisions of Section 75 of the Civil Procedure Act.

As the Applicants appeared to be challenging the view expressed by the Court, the Respondents submitted that they could only do so by way of an appeal.

In any event, if there was an error, and such error could only be found by long-drawn reasoning, the Respondents submitted that that error was an error that was not apparent on the face of the record. For that final submission, the Respondents relied on ***NYAMOGO & NYAMOGO ADVOCATES -VS- KOGO [2011] 1 E.A. 173.***

I have given due consideration to the submissions made before me. I have carefully perused the Ruling, the Order and the two applications dated 8th January, 2007 and 29th January, 2007, respectively.

The application dated 8th January, 2007 was filed by the Defendants, whilst the application dated 29th January, 2007 was filed by the Plaintiffs.

By the application dated 8th January, 2007, the Defendants sough 3 substantive reliefs, as follows;

"(c) ***There be a stay of execution/enforcement of the Decree in this suit pending the interpretation of the decree herein;***

(d) ***The honourable court be pleased to interpret the decreeherein by interpreting the scope, the land involvedand land excluded and the basis for determining theshares and mode, extent and manner of enforcement, and issue such orders that such other orders be made as are just and expedient toenable the proper and lawful enforcement of the decree herein.***

(e) **Pursuant to (d) above, the Court do givedirections on which Land Parcels, namely L.R.No. 8822, 6617 and 8637 will be subject to the execution of the decree and the extent andmanner of sub-division of the Land Parcels."**

The Defendants' reasons for seeking those orders were that the Decree and Award were ambiguous; some parcels of land had already been compulsorily acquired; and the scope of the land involved was not clear.

As a result, the Defendants felt that the Plaintiffs were deliberately targeting the parcels of land belonging to the Defendants, even when such parcels of land were not the subject matter of the case.

In my understanding of that application, it sought the interpretation of the Decree, so as to make it clear about the land which was to be subjected to distribution.

That appeared to be necessary because the Tribunal had, apparently, left out portions of the land, whilst the Government had compulsorily acquired some other portions of the land.

Meanwhile, the Application dated 29th January, 2007, sought the following two (2) substantive reliefs.

" 2. ***THAT there be a stay of survey, subdivision, or any other or further process in relation thereto, by the Respondents,in relation to land parcels No. L.R. 8822, 6617 and 8637 pending the hearing and determination of this application.***

3. ***THAT the subdivision so far done, at the instances***

of the Respondents or any other person, be and

are hereby declared irregular, illegal, null, void

and inconsistent with the decree herein and

the same be canceled, together with the deed

plans drawn pursuant to the said subdivisions,

and any other action that may have been taken

after 2002."

The reason for seeking those orders was that the decree had not been executed because of the actions of the Defendants, who had conducted illegal subdivisions, which were not consistent with the Decree.

In effect, the Plaintiffs wished to have the Decree given effect as it was, whilst the Defendants wanted a stay of execution of the Decree until it had been interpreted and made clear. The Defendants consider the Decree too ambiguous, for execution.

The point I am making is that the two applications are different. Secondly, neither of the said applications sought the striking out of the appeal.

However, in the Ruling dated 7th August, 2013, the learned Judge commenced as follows:

" The application is brought by way of Notice of Motion

under the Provisions of Order 50 Rules 1 and 42 Rules

1 & 2 of the Civil Procedure Rules and Section 3 A and

75 of the Civil Procedure Act Cap 21.

The Applicants seek the following Orders:

1. ***THAT the appeal be struck out;***
2. ***THAT the costs of the application and the appeal be borne by the Appellant"***

Clearly the application dated 29th January, 2007 did not seek to strike out the appeal. Therefore, it is obvious that when the Court set out to determine an issue which did not flow from the application dated 29th January, 2007, there was a disconnect between the Ruling and the application. That disconnect is apparent on the face of the record.

It is so apparent that it got me thinking that there was no way that the learned Judge could have made such a mistake.

I therefore revisited the proceedings leading up to the Ruling in issue. The record shows that on 1st November, 2011, there was a consent order, fixing the application dated 10th January, 2008 for hearing on 6th December, 2011.

When that application came up for hearing, the three parties all agreed to file written submissions. The learned Judge allowed the parties to file their respective written submissions.

It is clear, from the record, that the application dated 10th January, 2008 was seeking the striking out of the appeal, because it had been filed without the leave of the court.

Earlier, on 17th December, 2009, **J.L.A. Osiemo J**. had delivered a Ruling on the application dated 10th January, 2008. His Ruling was on a Preliminary Objection, that had asserted that the attempt to strike out the appeal could not be dealt with by the court before the appeal was admitted to hearing.

The learned Judge struck out the Preliminary Objection, which queried the Court's jurisdiction. The Court held that the Respondent to the Appeal ought to have waited until the appeal had been admitted, before he could challenge the competency of the said appeal.

That meant that the application dated 10th January, 2008 remained alive. To my mind, that explained **Mr. Kuloba's** submissions, that this court should;

> **" review the order dated 7/8/2013, and to find that the**
>
> **Appellant required leave from the Magistrate's**
>
> **Court, before the appeal was filed – See Order 42 rule 1**
>
> **(2) of CPR."**

I therefore asked myself why this court should be called upon to make a finding on the issue as to whether or not leave to appeal was required, if that issue had not featured in the application that gave rise to the Ruling which I have been asked to review.

My conclusion is that the Ruling in issue was not in relation to the application dated 29th January, 2008. It was on the application dated 10th January, 2008.

This conclusion arises from the fact that this is a court of record. The record of the proceedings shows that on 8th July, 2011, the parties attended at the Court Registry, and fixed a date for the hearing of the application dated 10th January, 2008.

The date which was fixed is 1st November, 2011.

On that date, the application was adjourned to 6th December, 2011. And on 6th December, 2011, **Mr. Manani** advocate expressly made reference to the application dated 10th January, 2008.

In her Ruling, the learned Judge, **Mshila J.**, made reference to the application dated 29th January, 2007. She indicated that the Court had perused the said application. At no time did the court indicate that that was the application that it was giving consideration to.

In the final analysis, I find no reason, in law or in fact, to warrant the review sought. The application has no merit. It is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED, AT ELDORET,

THIS 17TH DAY OF JANUARY 2014.

…......................................

FRED A. OCHIENG

JUDGE.