



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCA NO. 134 OF 2002**

**JULIUS MWIRIGI MANYARA.....APPLICANT/APPELLANT**

**VERSUS**

**ALEXANDER KITHURE.....RESPONDENT**

**R U L I N G**

The applicant **JULIUS MWIRIGI MANYARA SAMSON** through an application brought pursuant to Order 45 Rules 1(a), 2(1) and 5 of the Civil Procedure Rules seeks that the court do review its order made on 7<sup>th</sup> May, 2013 in which it directed that the application pending in this case dated 4<sup>th</sup> December, 2012 and 22-1-2013 be heard by the Deputy Registrar of the court.

The applicant's application is based on the grounds on the face of the application and more specifically that Order 49 Rule 5 of the Civil Procedure Rules expressly and emphatically takes jurisdiction in such application as the one dated 14<sup>th</sup> December, 2012 and 22.1.2013 away from the Deputy Registrar and the aforesaid provision reserves such jurisdiction to the Judge only.

The applicant further averred that the Honourable court was persistently misled into taking into account the provisions of Order 49 rule 58 of the Civil Procedure Rules.

The application is further supported by the applicant's affidavit dated 13<sup>th</sup> May, 2013. The applicant deponed that the Deputy Registrar has no jurisdiction to hear the application in question and sought the application be heard by the Judge.

The respondent is opposed to the application for review. In her Replying Affidavit dated 28<sup>th</sup> June, 2013 she averred that she learned that the applicant had filed an application dated 14<sup>th</sup> December, 2012 for approval of conditions of sale. That the respondent had earlier on filed an objection to the sale when the applicant had filed a similar application in the lower court.

The respondent further avers that both Counsel for applicant and the Respondent made their submissions before a Judge and that the applicant had a chance to point out the issue now being raised as this was not a new matter or evidence which was not within the Advocate's knowledge or could not be produced after exercise of due diligence.

The respondent deponed that the Deputy Registrar is empowered by the Rules of Civil Procedure to hear all applications filed under Order 22 of Civil Procedure Rules other than those under Rules 28 and 75. He concluded by stating that she believes that the Deputy Registrar has requisite jurisdiction to hear and

determine both applications.

That when the matter came up for hearing Mr. Karuti, learned Advocate appeared for the applicant and Mr. Kiambi learned Advocate appeared for the respondent. Their respective submissions were as per their pleadings which I have carefully considered. I have also considered the pleadings and the provisions of the Civil Procedure Rules relied upon by the respective parties in support of their opposing positions.

The issue for consideration is whether the applicant has satisfied the conditions for granting review as set out under Order 45 Rule 1(a) and (b) of the Civil Procedure Rules which provides:

***“1. (1) 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.”***

The applicant's application dated 14<sup>th</sup> December, 2012 was brought under Section 1, 1A, 3 and 3A of the Civil Procedure Act and Order 22 Rules 48(1), 55, 56 and 57 of the Civil Procedure Rules. The applicant sought to have court approve the conditions of sale of the judgment debtor's property known as NTIMA/IGOKI/1579.

In the application dated 22/1/2013 by the objector under Order 22 Rule 5 and 52 of the Civil Procedure Rules the objector sought that the Honourable Court do issue a stay of execution or in the alternative order that the application dated 14<sup>th</sup> December, 2012 be stayed pending the hearing and determination of the objection proceedings. The court after hearing both counsel and upon referring to Order 49 Rule 7(1) (x) of the Civil Procedure Rules and the provisions under which the applications were premised was of the view that the two applications should be referred to the Deputy Registrar for hearing and determination.

The applicant in seeking review for orders of referred this court to Order 45 Rule 1(a) (b) and 2(1) and Order 49 Rule 5 of the Civil Procedure Rules in support of this application.

Order 49 Rule 5 of the Civil Procedure Rules provides:

***“5. Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.”***

The respondent in response to the applicant's Counsel's submission submitted that Order 49 Rule 5 should not be considered in isolation and referred to Order 22 Rule 51 to 55 both of Civil Procedure Rules both inclusive and Order 49 Rule 7(1)(b),(x) of the Civil Procedure Rules.

Order 22 Rule 51-55 of Civil Procedure Rules both inclusive deals with objection to attachment, stay of execution, raising attachment, notice of intention to proceed power to order property to be sold and proceeds to be paid to the person entitled.

Order 49 Rule 7(1),(b),(x) of Civil Procedure Rules provides:

**7. (1) The Registrar may—**

**(a) give directions under Order 42 rule 12 and Order 51 rule 8;**

**(b) hear and determine an application made under the following**

**Orders and rules— (x) Order 22 other than under rules 28, and 75;**

The applicant's Counsel submissions are based on Order 49 Rule 5 of the Civil Procedure Rules. Order 49 of the Civil Procedure deals with special powers of Registrars. Order 49 Rule 5 of Civil Procedure Rules is express and emphatic that formal orders of attachment and sale of property and for issuance of Notice to show cause or the applications for arrest and imprisonment in execution of a decree of the High Court may be made by the Registrar, whereas in subordinate courts by an Executive Officer save in the event of any objection being taken to the proceedings thereunder, in which all further proceedings shall be before a Judge.

Order 49 Rule 7(1),(b) (x) of Civil Procedure Rules clearly states that the Deputy Registrar may hear and determine all applications made under Order 22 of the Civil Procedure Rules other than under Rules 28 and 75 of the Civil Procedure Rules respectively. The two applications subject of the application for review are brought under Order 22 Rules 48(1),55,56,57 and Order 22 Rule 5 and 52 of the Civil Procedure Rules. I find that the applications fall under the provisions of Order 49 Rule 7(1) (b),(x) of the Civil Procedure Rules.

The applicant in this application has failed to satisfy the court that there is a discovery of a new and important matter or evidence which after 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 made on an account of some mistake or error apparent on the face of the record or any other sufficient reason. I find that the applicant has failed to sufficiently demonstrate that there are sufficient grounds to warrant review. He has not met the conditions for review as set out under Order 45 Rule 1(a) and (b) of the Civil Procedure Rules.

I find that the application is without merits and the same is hereby dismissed with costs to the respondent.

**Dated, signed and delivered on this 25<sup>th</sup> February, 2014**

**J. A. MAKAU**

**JUDGE**

Delivered in open court in the presence of

1. Mr. Karuti for the Applicant
2. Mr. Kiambi for the Respondent

**J. A. MAKAU**

**JUDGE**