REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW NO. 13 OF 2010

REPUBLIC.....APPLICANT

-VERSUS-

THE MARAKWET LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATES COURT AT ITEN.....2ND RESPONDENT

THE KEIYO/ MARAKWET DISTRICT REGISTRAR.....3RD RESPONDENT

JOSEPH K. YOGO.....INTERESTED PARTY

KENDAGOR CHELANGA, KIBOR CHELANGA

AND MICHAEL CHELANGA.....*EX PARTE* APPLICANTS

RULING

1. The *ex parte* applicants pray that the order issued on 21st November 2012 dismissing the suit and all consequential orders and decree be set aside. They also pray that the original notice of motion for judicial review dated 6th April 2010 be reinstated and heard on its merits.

2. The history of the litigation at the High Court is short and straight forward. On 24th March 2010, the *ex parte* applicants obtained leave to apply for certiorari to remove into the High Court and to quash the award of the 1st respondent in Land Disputes Tribunal case number 22 of 2009 or 21 of 2009. Leave was also granted to seek an order of prohibition against the respondents. The *ex parte* applicants then brought a substantive notice of motion dated 6th April 2010.

3. The *ex parte* applicants fixed the motion for hearing for the 20th November 2012. The date was taken *ex parte*. On the hearing date, the *ex parte* applicants or their counsel failed to attend court. The respondents and interested party, who had been served with the hearing notice, applied that the motion be dismissed. In a ruling delivered on 21st November 2012, the Court (G. Ngenye J) dismissed the action. It is that action that has precipitated the present motion.

4. Each of the three *ex parte* applicants has sworn an affidavit in support of the motion. The depositions are fairly identical. They aver that the ill-fated motion was meant to be heard in Court No. 1 at Eldoret presided over by F. Azangalala J (as he then was); that according to the court records, the judge was not

sitting on 20th November 2012. The matter was instead placed before Court No. 3 (G. Ngenye J). The *ex-parte* applicants claimed to be unaware of that development. By the time their learned counsel got to the new court, the matter had been concluded. A ruling dismissing the notice of motion was delivered the next day.

5. The *ex-parte* applicants aver that failure to attend court was not deliberate. It is also contended that this is a long running land dispute land that should be determined at a full hearing. They blame their counsel for the mistake and plead that such mistake should not be visited upon them. There are other matters that go into the merits of the dismissed motion: for example, the award of the tribunal is impugned for being contrary to the Law of Succession Act and other land laws.

6. The motion is contested. The respondents oppose the motion purely on a point of law. They submitted that the Civil Procedure Rules on which the application is founded do not apply to judicial review. It was submitted that the only recourse open to the *ex parte* applicants is to *appeal* to the Court of Appeal.

7. The interested party also opposes the motion. There are grounds of opposition dated 4th December 2013. In the written submissions dated 27th January 2014, the interested party raises three issues. First, that it is the *ex parte* applicants' counsel who took the hearing date and served the interested party and the respondent for hearing on 20th November 2012. Secondly, and in compliance with the notice, the interested party's advocate attended court. As there was no appearance by the applicants' counsel or explanation for his absence, the court dismissed the application for want of prosecution. Thirdly, as neither the applicants nor their counsel has given plausible reasons for missing court on 20th November 2012, the motion is unmerited.

8. I have considered the pleadings, depositions and rival submissions. In ordinary civil litigation, the court has wide and unfettered discretion to set aside an ex-parte order. As stated in *Shah v Mbogo* [1967] E.A 116, the discretion *"is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"*. That decision of Harris J was sustained by the Court of Appeal in *Mbogo and another v Shah* [1968] E.A 93. See also *Kimani v Mc Connell* [1966] E.A 547.

9. But these are proceedings *sui generis.* I agree that in judicial review applications, Order 53 is a self-contained code. There is no provision there or in the Law Reform Act that *expressly* provides for power to set aside or review an order made in judicial review. The submissions by the respondents and the interested party that the only remedy is an *appeal* are thus not prosaic. But legal rules do not operate in a vacuum and were never meant to evacuate substantive justice. The ground has also shifted: the Court is now enjoined by Article 159 of the Constitution as read with sections 1A and 1B of the Civil Procedure Act to do *substantial justice* to the parties. That is the overriding objective. See *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

10. It cannot then be that the court's hands in a judicial review application are completely tied to undo or review its own orders. I am fortified in that finding by the Court of appeal in *Nakumatt Holdings Limited v Commissioner of Value Added tax* Nairobi Civil Appeal 200 of 2003 [2011] eKLR. The circumstances were a little different but still on point. The court stated as follows-

"There has been debate as to whether or not order 44 of the civil procedure rules applies to proceedings under order 53. Whether order 44 above applies is a matter which should await another occasion. What is important is that the superior court in the matter before us had the residual power to correct its own mistake. It may be that the appellant cited a wrong provision of the law in its application for review. That per se would not deprive the court the power of correcting its own mistake which that court itself acknowledged it made."

11. The decision in *Nakumatt Holdings* (supra) has been followed by a number of decisions all upholding the *residual power* of the court to set aside an order in judicial review proceedings. See for example

Republic v District Land Registrar Uasin Gishu & another Eldoret, High Court JR 39 of 2010 [2014] eKLR. In *Republic v Anti-Counterfeit Agency & 2 others Ex Parte Surgipharm Limited*, Nairobi, High Court JR 11 of 2012 [2014] eKLR, Odunga J was emphatic that "*in appropriate cases the court, when properly moved may perfectly grant orders reviewing or setting aside orders made in judicial review proceedings*." I agree with those remarks. There would be little or no value in asking the applicant here to embark on the journey of appeal: what substantive decision would the applicant be taking to the appeal? And why would this Court fold its arms or raise them in the air and proclaim it is powerless? It would be anathema to the overriding objective of the court to do substantial justice.

12. That brings me to the present motion. The averments by the ex parte applicants have not been controverted. No replying affidavit has been presented. The respondent and interested party chose instead to mount a technical defence to the action. I would not say the reason proffered by the *ex parte* applicants or their learned counsel is not plausible. I have for example studied a notice from the Court annexed to the affidavit of J. Cheptarus and marked *JCK1*. It is addressed to all litigants and advocates advising them that Azangalala J (as he then was) would not be holding court between 19th November 2012 and 23rd November 2012. It is not then far- fetched for the applicants to have imagined (quite wrongly) that their matter would not be proceeding. I have also considered that the mistake and sins of counsel should not *always* be visited upon the client. And finally, the underlying dispute is a decades old land matter. The interests of justice would be best served by a hearing on merits. I do not see any prejudice on the respondents or interested party that cannot be compensated by an award of costs.

13. In the result, the order of the Court made on 21st November 2012 dismissing the notice of motion dated 6th April 2010 is hereby set aside in its entirety. I grant the respondents thrown away costs of Kshs 5,000. I also award the interested party thrown away costs of the same amount. Those costs shall be paid within twenty one days or before the next mention or hearing of the reinstated notice of motion, whichever is earlier. The *ex parte* applicants shall fix the notice of motion for hearing within the next 30 days. In default, the order setting aside the dismissal shall be vacated automatically and the motion shall stand dismissed with costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of October 2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of:-

Mr…… for the *ex-parte* applicants instructed by Joseph C.K. Cheptarus & Company Advocates.

Ms…… respondents instructed by the Hon Attorney General.

Mr……..for the interested party instructed by C. K. Yano & Company Advocates.

Mr. J. Kemboi, Court clerk.