



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC JUDICIAL REVIEW CASE NO E002 OF 2021

LABAN NDUVA MASAI.....EX PARTE APPLICANT

VERSUS

THE LAND CONTROL BOARD MUKA SUB COUNTY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

DEPUTY COUNTY COMMISSIONER MUKAA SUB COUNTY.....INTERESTED PARTY

AND

ISAAC MAWEU MUIA (as legal representative of Mary Vose Muia).....APPLICANT

RULING

1. Before me is a Notice of Motion application dated 15th of November 2021 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Orders 45 Rule 1, 51 Rule 1 and all other enabling powers of the court and enabling provisions of the law, wherein the Applicant is seeking for the following orders:-

1) Spent

2) That the order given by the Honourable Court on 7th of April 2021 and any other order supplemental thereto be reviewed and/or set aside

3) That alternatively and without prejudice to the foregoing, there be a stay of proceedings until further orders and inter partes hearing of the application.

4) That the cost of this application be provided for.

2. The application is premised on the grounds on the face of the application. A summary of the grounds is that the Applicant is aggrieved by the order of the court issued on 7th of April 2021 which has been used as a fraudulent means to encroach on land parcel number Machakos/Ulu/331 which is adjacent to land parcel number Machakos/Ulu/450 and Machakos/Ulu/451. That unless the order is reviewed or set aside, the Estate of the late John Muia Kali and by extension the Estate of Mary Vose Muia will suffer irreparably.

3. The application is supported by the affidavit of Isaac Maweu Muia, the Applicant, sworn on the same day. The Applicant averred that land parcel number Machakos/Ulu/381 is registered in the name of his late father Muia Kalii, while land parcel number Machakos/Ulu/450 and Machakos/Ulu/451 is registered in the name of the Ex parte Applicant.

4. He further averred that the Ex Parte Applicant caused the index map to be amended before applying and obtaining leave from the Land Control Board to subdivide his titles, and as a result he encroached on land parcel number Machakos/Ulu/381 thereby effecting wrongful subdivisions. The Applicant contends that the amendments caused by the Ex Parte Applicant in the map and on the ground amounted to grabbing his land. He maintains that unless the orders are granted, the Applicant would suffer irreparably.

5. Opposing the application, the Ex Parte Applicant vide his replying affidavit sworn 3rd of November 2021 averred that the proceedings herein were concluded and compromised on 19th of July 2021 after he was granted consent by the Land Control Board to transfer land parcels no Machakos/Ulu/450, Machakos/Ulu/451 and Machakos/Ulu/28 which had since been executed. He further averred that the Applicant was a stranger to the proceedings as he had not sought for leave to be enjoined as a party and hence he was incapable of bringing the present application. He argued that there was no live suit in which he Applicant could be enjoined.

6. He further averred that the Advocate who drew the pleadings was a stranger to the proceedings as he had not been appointed as required by Order 9 Rule 1 of the Civil Procedure Rules. The Applicant contends that the prayers sought in the application were incapable of being granted as the impugned order was not against the Applicant.

7. He further averred that he had no interest in land Parcel number Machakos/Ulu/381 which borders Nairobi Highway as it was acquired by the Government in 1994 and was appreciated by Justice Pall in his judgment in HCCC No 1727 of 1990 delivered on 25th of July 1995.

8. Opposing the application, the Respondents vide the grounds of opposition dated 10th of January 2022 stated as follows:-

a) That the Applicant has not met the threshold required for granting of an order of review and or setting aside

b) That the application was bad in law and incurably defective

c) That the application is frivolous, vexatious and abuse of the court process.

9. The 3rd Interested Party in his replying affidavit averred that he was in support of the application. He averred that the land parcels No 450 and 451 did not belong to the Applicant but to one Muthoka Itumo (deceased). He further averred that Petition number 16 of 2019 in which the 1st Interested Party has sought for a grant of letters of administration was still pending for confirmation. That prior to the confirmation of the grant, the Ex Parte Applicant encroached on the deceased estate which prompted the Petitioner to file an application dated 26th of October 2020 to restrain the Applicant.

10. The application was canvassed by way of written submissions.

11. The Applicant's written submissions were filed on 14th of January 2022. Counsel for the Applicant submitted that by virtue of the provision of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, any person and not necessarily a party to the case could apply for review. He further submitted that the fact that the judicial review was compromised, it could not deny the Applicant who was not privy to it his right to redress as the compromise was between the ex, parte Applicant and the Respondent. He contends that the issues raised in the replying affidavit touch on the merits of the order sought which can only be canvassed once the review is opened.

12. The Respondent/Ex Parte Applicant's written submissions were filed on 24th of January 2022. Counsel for the Respondent submitted that the Applicant was a stranger to the proceedings as he was not a party to the Judicial Review nor had he applied to be enjoined in the suit. Counsel further submitted that Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules stipulates that it is only a party to the proceeding that can apply for review and must meet the requirements of the above provisions of the law. To buttress his submissions, he placed reliance on the case of **Abdulkarim Saleh Muhsin v Nedim Mohammed Ibrahim & 3 Others (2021) eKLR**.

13. Counsel further submitted that there was a delay of 7 months in bringing the application as the consent was made on 7th of April 2021 while the application was made on 15th of November 2021.

14. Counsel further submitted that the firm of F N Mulwa had not filed a Notice of Appointment of Advocate hence the application was invalid and that it should expunged from the record. To support his submissions, Counsel placed reliance on the case of **Techno Service Limited v Nokia (2020) eKLR**.

15. Counsel argued that there was nothing to be stayed as the proceedings were concluded.

16. The Respondents written submissions were filed on 1st of March 2022.

17. Counsel for the Respondents submitted that the Applicant had not satisfied the requirements for the grant of an order for review and setting aside as set out section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. To buttress his submissions Counsel relied on the following cases:-

a) **Nasibwa Wakenya Moses v University of Nairobi & Another (2015) eKLR**.

b) **Patriotic Guards ltd v James Kipchirchir Sambu (2018) eKLR**.

ANALYSIS AND DETERMINATION

18. Having considered the application and the rival submissions, I find that the main issue for determination is whether the Applicant has met the threshold for reviewing and setting aside the orders made on 7th of April 2021.

19. The law that governs Applications for review is set out in Section 80 of the Civil Procedure Act and on Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:-

Any person who considers himself aggrieved –

- a) **By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or**
- b) **By a decree or order from which no appeal is allowed by this Act**

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

20. Order 45 Rule 1 of the Civil Procedure Pules provides that:-

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 the judgment to the court which passed the decree or made the order without unreasonable delay.**

21. The provisions of Order 45 were restated by the Court of Appeal in the case of **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited (20140 eKLR)**.

22. It is apparent from the above provisions that for an applicant to succeed in an application for review, he must establish that:-

- a) *Discovery of new and important matter or evidence which after the exercise of due diligence was not with the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.*
- b) *Existence of some mistake or error apparent on the face of the record*
- c) *Any other sufficient reason*
- d) *Application be made without unreasonable delay.*

23. From the above provisions, it is clear that while section 80 of the Civil Procedure Act gives the court the power to make orders for review, Order 45 Rule 1 of the Civil Procedure Rules sets out the conditions to be met in a review.

24. The ex parte Applicant filed this Judicial Review Application on 15th of April 2021 and sought for the following orders against the Respondents:-

- 1) **That this Honourable Court be pleased to issue an order of Certiorari to remove this Honourable Court the decision by the Land Control Board, Mukaa Sub County to refuse to grant consent to the Applicant and have the same quashed.**
- 2) **That this Honourable court be pleased to issue an order of Mandamus directed to the 1st Respondent herein compelling him to grant consent to the Applicant to transfer all that parcel of land known as Machakos/Ulu/450, Machakos/Ulu/451 and Machakos/Ulu/28.**
- 3) **In the alternative, this Honourable court be pleased to issue an order that if the 1st Respondent be deemed not to have any reasons and in which event an order of Mandamus shall issue compelling the 1st Respondent to issue the said consents.**
- 4) **Costs of and incidental to this application be provided for.**
- 5) **Such further or other reliefs as the Honourable Court may deem just and expedient to grant.**

25. Upon the application by the ex parte Applicant, the Judicial Review application dated 14th of April 2021 was on 19th of July 2021 marked as compromised with no orders as to costs.

26. I will first of all deal with the issue on whether a person who is not a party to proceedings before the court can file an application for review or setting aside under Order 45 Rule 1 of the Civil Procedure Rules.

27. My understanding of Order 45 is that it has two distinct parts. Under sub rule (1) the review application may be brought by any person

considering himself aggrieved, while under sub rule (2) it may be brought by a party who is not appealing from the decree or order.

28. Although the Applicant was not a party to the judicial review proceedings herein, Order 45 Rule 1 provides that he may apply for judicial review if he considers himself aggrieved. The Applicant submitted that Order 45 Rule 1 of the Civil Procedure Rules provides that an application for judicial review can be brought by any person who considers himself aggrieved by the decree or order of the court. Learned counsel for the ex parte Applicant submitted that the Applicant was a stranger to the proceedings as no leave was sought to enjoin him to the proceedings. This was not disputed by the Applicant. Although Order 45 Rule 1 provides that the application can be made by any person who considers himself aggrieved, that application in my view must be made by a person who is properly on record. A person cannot have the locus standi to address the court unless and until they are properly on record.

29. For the Applicant to apply for judicial review, he must first apply for leave to be enjoined as a party thereto. In the present matter, it is not in dispute that the Applicant did not apply leave to be enjoined as a party in these proceedings.

30. Counsel submitted that the matter having been concluded on 19th of July 2021 there was live proceedings in which the Applicant could be enjoined in. Upon perusal of the court record, I note that the matter was coming for hearing. Mr Makundi learned Counsel for the Ex Parte Applicant was present while Counsels representing the Respondents and the Interested Party were absent. Mr Makundi addressed and informed the court that the Land Control Board had since granted his client (the ex parte Applicant) consent to transfer the parcels of land. He requested the court to mark the matter as compromised with no orders as to costs as there was nothing left to pursue. The court proceeded to mark the matter as compromised with no orders as to costs. The net effect of his application was that there was nothing left to be litigated upon. The compromise was analogous to a final judgment. Order 45 Rule 1 one of the Civil Procedure rule envisages a scenario where there is a decree or order in which an appeal is allowed but no appeal has been preferred or where there is a decree or order where no appeal is allowed. Upon perusal of the court proceedings for the 19th of July 2021, I note that the court did not issue any substantive orders that the Applicant can apply to review or set aside.

32. Counsel for the ex parte Applicant submitted that the application should be expunged from the court record as the counsel for the Applicant had failed to file a Notice of Appointment of Advocate.

33. Order 9 Rule 1 of the Civil Procedure Rules requires an Advocate acting for a party to be appointed to act. The rule provides as follows :-

Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent, or by an advocate duly appointed to act on his behalf.

34. Order 9 Rule 7 of the Civil Procedure Rules provides as follows:-

“Where a party, after having sued or defended in person appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications”

35. The present application was drawn and filed by the firm of F N Mulwa and Company Advocates. A perusal of the record confirms that no Notice of Appointment was filed by the firm of F N Mulwa Advocates. As rightly submitted by Counsel for the Ex Parte Applicant, that lack of notice is contrary to the law. The only way an Advocate can prove he/she is an authorized agent of a party is by filing a Notice of Appointment of Advocates. Having failed to file that Notice, the firm of F N Mulwa had no, legal basis to file the Notice of Motion application.

36. The upshot of the foregoing is that the application dated 15th of November 2021 is devoid of merit and the same is dismissed with costs to the Respondents.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF APRIL, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Mohammed

Langalanga for Applicant