



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 62 of 2011

JAMES MUTHII NJOGU.....APPELLANT

VERSUS

FRANCIS MUYA NJOGU..... RESPONDENT

(Being an appeal from the Ruling of D.A. OCHARO Resident Magistrate Wanguru delivered on 28th April 2011 in Civil Case No. 150 of 2008)

R U L I N G

The Applicant has filed the application dated 20th April 2012 for Review under Section 80 of the Civil Procedure Act, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules for orders of review and setting aside of the judgment delivered on 15/3/2012.

The grounds are that:-

1. *New facts have emerged.*
2. *The Court failed to consider the proceedings in HCA 61/2001 as submitted by counsel.*

The application is supported by the affidavit of one Francis Muya Njogu who gives a long history of the facts in HCA 61/01 which he believes this court never looked at. The application is opposed by the respondent who has filed a replying affidavit. He states that no new matters have arisen.

Both counsels have filed their submissions. This court allowed the appeal herein on one main ground that the appellant was denied **an opportunity to be heard**. The judgment that was set aside was a result of a violation of the appellant's right to be heard a per the rules of natural justice.

This injustice flowed from the matter under appeal in Embu HCA 99/2010. It is therefore clear that there was no reason for me to start evaluating the evidence adduced in the court below as it was one sided. Having so found, I did not have any reason for going through the proceedings and record in Embu HCA 61/2001?

The evidence being adduced vide the affidavit of the applicant would only have been relevant if the hearing in the court below had been properly conducted and the appeal heard on merit. What the court found was that the proceedings in the court below were biased against the appellant as he was denied a chance to be heard. He even applied to be given an opportunity to present his case and the same was rejected.

So in relation to this finding, is there anything new? Is the applicant saying I erred in finding that the Respondent was not given a chance to be heard? Issues of new facts being discovered about ownership of the Rice holding have no bearing on the finding I made concerning the court denying the Respondent an opportunity to be heard. The Respondent must be heard and a decision arrived at on merit. Even the issues of HCA No. 61/2001 should be raised before that trial court. The alleged new facts should also be presented before the trial court. I therefore find no reason to make me grant the orders to set aside the judgment delivered herein on 15/3/2012.

On the issue of costs, I have noted that it is the lower Court which erred in denying the Respondent a chance to be heard. That was an oversight on the part of this court. I therefore review the earlier order on costs and set it aside. I substitute it with an order that each party bears his/her own costs. The same applies to this application.

DELIVERED, SIGNED AND DATED AT EMBU THIS 20TH DAY OF FEBRUARY 2013.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Ms. Ndorongo for Applicant

Njue CC