



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR ELC NO. 14 OF 2011

STEPHEN KIMOTHO KARANJA.....APPLICANT

VERSUS

LAND DISPUTE TRIBUNAL LIMURU DIVISION,

KIAMBU WEST DISTRICT.....RESPONDENT

SENIOR PRINCIPAL MAGISTRATE'S

COURT AT LIMURU.....2ND RESPONDENT

DISTRICT LAND SURVEYOR, KIAMBU.....3RD RESPONDENT

PAUL WANDATI MBOCHI.....4TH RESPONDENT

RULING

By a ruling delivered in this matter on 16th June, 2011, D. Musinga, J (as he then was) issued orders of certiorari in which he quashed the decision of the Land Disputes Tribunal Limuru Division, Kiambu West District and the adoption of the same by the Senior Principal Magistrate's Court at Limuru as a judgment of the court. He at the same time issued an order of prohibition prohibiting the District Land Surveyor, Kiambu from complying with the magistrate's judgement by allocating beacons for the access road picked from Land Title Number LIMURU/NGECHA/779 and amending the Registry Index Map to reflect the access road on Land Title Number LIMURU/NGECHA/2004 and 2153.

Paul Nduati who was the 4th respondent in the substantive proceedings has now brought the application dated 8th September, 2011 in which he seeks a review of the said decision. The application is brought under Order 45 Rules 1(a) and 2(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The basis of the applicant's application is found in grounds 3 and 4 on the face of the application

which are in the following words:-

“3. THAT amongst the reasons cited by the Honourable Court for the grant of the said orders was that Khamoni, J had directed Kiambu District Registrar and the District Surveyor to resolve the dispute but in contrast the said ruling in ELC 569 of 2008 and the order extracted thereof does not direct the said officers or the parties to do so.

4. THAT the court ruled that the issue of the plaintiff in suit No. ELC 569/08 failure to serve summons should have been raised by the defendant in the said suit had already been raised and Muchelule, J delivered his ruling that the said summons be served within 14 days but the plaintiff failed to comply and he cannot be allowed to enjoy further court orders if he has come to court with unclean hands.”

The application is also supported by an affidavit sworn by the applicant. Through the said affidavit the applicant in paragraph 8 stresses the grounds in support of the review as follows:-

“THAT I swear this affidavit in support of my prayer that the court do review its ruling delivered on the 16th June, 2011 particularly the issue of costs and non-compliance of direct court orders in ELC No. 569 of 2008 by the plaintiff for the ends of justice to be met since the judicial review orders were made based on an error on the face of the record that:

a.I was a party in ELC No. 569 of 2008 whereas I had not been served with summons due to the plaintiff’s failure to comply twice with direct orders of the court.

b.And there were no orders directed at the land registrar and the District Surveyor to resolve the dispute.”

Stephen Kimotho Karanja who is the respondent for the purposes of this application opposed the same through a notice of preliminary objection dated 14th November, 2011. His case is that under Section 8(3) of the Law Reform Act this court has no jurisdiction to vary, review or set aside its own orders. He contends that Order 45 Rules 1(a) and 2(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act are not applicable in judicial review proceedings since judicial review matters are provided for by Order 53 of the Civil Procedure Rules. He also argues that even if Order 45 of the Civil Procedure Rules was applicable, the applicant would still not succeed as he has not met the criteria for review as set out in the said order.

Order 45 Rule 1(1) of the Civil Procedure Rules provides that:-

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.

It is therefore apparent from the above cited rule that a decree or order can only be reviewed when there is new evidence, an apparent error on the face of the record or for any other sufficient reason. The applicant herein has based his application on an apparent error on the face of the record. It is the applicant’s case that the decision was based on the allegation that he was a party in ELC No. 569 of 2008 but the correct

position is that he had not been served with summons despite a court order directing such service. According to the applicant, another error on which the decision was based is the finding by the court that there was an order issued in Nairobi HC ELC No. 569 of 2008 directing the Land Registrar and the District Surveyor to resolve the land dispute whereas there was no such order.

Regarding the orders issued by Khamoni J in Nairobi High Court ELC No. 569 of 2008 the learned Judge observed in his ruling thus:-

“There is no dispute that there exists boundary dispute between the applicant and the 4th respondent. Khamoni, J made a finding to that effect and directed that the boundary dispute be resolved in the terms of Section 21 of the Registered Land Act. Following that ruling the District Land Registrar and the District Surveyor visited the two parcels of land but it appears that the boundary determination has yet been finalized. While the High Court case was still pending in court and before the boundary was fixed, the 4th respondent filed a case before the Limuru Division Land Disputes Tribunal”

On the issue of failure to serve the applicant with the summons the Judge stated thus:-

“Whereas the applicant has failed to pay the respondent’s costs as ordered as well as serve summons to enter appearance upon the 4th respondent, that *per se* could not justify filing of the land dispute before the tribunal. The 4th respondent’s remedy lies in making an appropriate application in the said suit.”

It is therefore clear that the court was alive to the issues raised by the applicant and made determinations on the same. The main reason that made the court reach the decision it reached is contained in the following passage:-

“A land Disputes Tribunal cannot deal with a matter that is pending before the High Court. There was procedural impropriety on the part of the 1st and 4th respondents. If the dispute had not been referred to the High Court the land disputes tribunal would have had jurisdiction to deal with the same but in the prevailing circumstances, the tribunal had no jurisdiction to deal with the dispute. Its decision is therefore null and void and the purported adoption of the same by the 2nd respondent is of no legal consequence.”

The applicant has not laid any basis for reviewing the said decision. The applicant is a party in Nairobi High Court ELC No. 569 of 2008. That is why the court directed that he be served with summons. He cannot therefore be heard to say that the court made an error by making a finding that he was a party in Nairobi HC ELC No. 569 of 2008. The Court also clearly addressed the issue of service of summons and concluded that if the applicant had any issue about the service of summons then he ought to have made the application in the ELC matter. There is therefore no apparent error on the face of the judgement of the court and the application should fail.

Having reached the above conclusion, I do not find it necessary to address the issue as to whether this court has jurisdiction to vary or review a decision made in judicial review proceedings.

The applicant/4th respondent will meet the costs of the respondent/ex-parte applicant for this application.

Dated signed and delivered at Nairobi this 16th day of April , 2013

W K KORIR,

JUDGE

