



**No. 2938**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 349 OF 1996**

RICHARD OMARI NYAMATURA ..... PLAINTIFF  
-VERSUS-  
DANIEL OMBACHI MOGENI ..... RESPONDENT

**RULING**

On 20<sup>th</sup> April, 2011, the applicant filed the instant application seeking 4 prayers, to with:-

- “1. That the judgment entered herein on 24<sup>th</sup> April, 1997 and all other consequential and subsequent orders emanating thereof be and is hereby set aside,***
- 2. That the judgment entered herein on 24<sup>th</sup> April, 1997 and all other consequential and subsequent orders be and is hereby varied and/or reviewed.***
- 3. That subsequently, the Nyamira District Land Surveyor’s report dated 5<sup>th</sup> February, 1997 and filed in court on 14<sup>th</sup> March, 1997 be expunged from the court record and appropriate orders and/or directions be issued in respect of the rectified survey map herein.***
- 4. That in view of the circumstances of this case and in the alternative, appropriate, suitable and proper orders be issued in respect of the order dated 13<sup>th</sup> August, 1997 and the Land Surveyor’s report dated 5<sup>th</sup> February, 1997 and filed in court on 14<sup>th</sup> March, 1997.***
- 5. That the costs of this application be provided for...”.***

The grounds in support of the application are that:

- “1. That on 24<sup>th</sup> April, 1997, judgment was entered by this honourable court (“the said judgment”) in favour of the defendant against the plaintiff and according to the said judgment, the plaintiff was ordered to vacate all that parcel of land known as LR No. West Mugirango/Siamani/2256.***
- 2. That the said judgment was totally and substantively based on the report prepared by the Nyamira District Land Surveyor dated 5<sup>th</sup> February, 1997 together with the annexed survey map and filed in court on 14<sup>th</sup> March 1997 which states inter alia that the plaintiff was in occupation of part of the defendant’s parcel of land known as LR No. West Mugirango/Siamani/2256 which report and survey map were inaccurate and misleading.***
- 3. That subsequently, on 10<sup>th</sup> November, 2008, the court issued eviction orders and warrants of arrest against the plaintiff. The defendant in execution thereof, demolished the plaintiff’s three (3) units of residential houses comprising three (3) bedrooms each on the ground that the same were allegedly built partly on the defendant’s parcel of land known as LR No. West Mugirango/Siamani/2256. The said orders were also erroneously issued in view of the said inaccurate and deficient report and survey map.***

4. That after extensive and numerous demands on the correct survey map in respect of the parcel of land to the lands office at Kisii, the plaintiff has now obtained from the relevant lands office the proper and correct survey map from the relevant department of survey at the ministry of lands which indicates the accurate and correct boundaries in respect of LR No. West Mugirango/Siamani which belong to the defendant and LR No. west Mugirango/Siamani/2257 which belongs to the plaintiff and adjacent to the defendant's land.

5. That the aforesaid survey map from the said district survey department clearly indicates that the residential buildings erected by the plaintiff and subsequently demolished by the defendant were correctly built on the plaintiff's parcel of land known as LR No. West Mugirango/Siamani/2257 and that indeed, that parcel of land belong to the plaintiff as has existed before the said judgment.

6. That there is a new and important matter of evidence which was not within the plaintiff's knowledge and could not be produced by him at the time when the said judgment was delivered, a decree passed and/or the other consequential orders made.

7. That in any event, the said report and survey map that were relied upon in making the said judgment were provided in court pursuant to a court order and by an expert and the plaintiff did not have control over the accuracy or otherwise of the same.

8. That in view of all the foregoing and unless the said judgment of 24<sup>th</sup> April, 1997 and all other consequential orders ensuing thereof are set aside, varied and/or reviewed as prayed:-

a. The plaintiff who has been illegally deprived of his parcel of land known as LR No. West Mugirango/Siamani/2257 will continue to be so deprived contrary to law to his detriment;

b. The plaintiff will continue to suffer grave loss and prejudice since he is unable to access and develop his parcel of land known as LR No. West Mugirango/Siamani/2257 and the defendant will continue to unjustly enrich himself while continuing to occupy land that does not belong to him pursuant to an erroneous report and judgment.

c. The plaintiff has suffered loss and damage as a result of the demolition of the residential houses erected on his parcel of land known as LR No. West Mugirango/Siamani/2257 and has indeed lost enormous income over the years in addition to the construction costs expected on the demolished houses;

d. The ends of justice and equity will be defeated and frustrated as the defendant will continue to occupy part of the plaintiff's parcel of land known as LR No. West Mugirango/Siamani/2257 without any justifiable reason whatsoever and making it difficult and /or impossible for the plaintiff to carry out any construction and/or developments on his parcel of land aforesaid.

9. That in view of the foregoing, there is good and sufficient cause for setting aside of the said judgment and/or review of the same together with all other subsequent consequential orders.

10. That this application has been made diligently and without unreasonable delay in light of the circumstances of this case.

11. That no prejudice will be occasioned to the defendant if the said orders are granted and justice delivered as per the proper survey map in respect of the two parcels of land aforesaid.

12. That accordingly, it is in the interest of justice and fairness that the said judgment and all other consequential orders pursuant thereto be set aside, varied and/or reviewed as prayed hereinabove and the court do make appropriate orders in respect of all the costs that have been incurred so far in respect of the various orders issued in this case...”.

In support of the application, the applicant swore an affidavit. From that affidavit, one gets a glimpse of the history of this rather old dispute which appears to be that, by a plaint dated and filed in this court on 8thh November, 1996, the applicant sought the following prayers against the respondent:-

“- Permanent injunction to restrain the defendant, his agents or servants from in any way interfering with the plaintiff's quite enjoyment of his plot or parcel of land known as West Mugirango/siamani/2257, hereinafter, the suit premises.

- General damages

- Costs if any incidental to the suit.

- **Any other relief that the court could deem fit to grant...”.**

Simultaneously with the filing of the suit, the applicant took out a chamber summons application graving for a temporary injunction. The application as expected was opposed by the respondent through a replying affidavit filed on 3<sup>rd</sup> December, 1996. When the application came up for interpartes hearing on 4<sup>th</sup> December, 1996, parties entered into a consent to refer the dispute to Nyamira District land surveyor who was to visit the three parcels of land namely the “**suit premises**”, **West Mugirango/Siamani/2178** and **225** respectively and mark the boundaries. He was thereafter expected to file an appropriate report with the court. The latter two parcels of land belonged to the respondent and bordered the suit premises. It was also part of the consent that any party that was to be found to have encroached on another’s parcel of land was to vacate the same forthwith. On 24<sup>th</sup> March, 1997, the report of the Nyamira District Land Surveyor was read to the parties in court and thereafter on 24<sup>th</sup> April, 1997, the court adopted the same as a judgment of the court. In effect the judgment was in favour of the respondent’s and the applicant was therefore expected to vacate a portion of, **West Mugirango/Siamani/225** that he was then occupying.

Dissatisfied with the said judgment and decree, the applicant sought a review of the same on the grounds that the District Land Surveyor’s report was not conclusive and final and that there was an error on the face of the record as it had not been signed. The application was opposed. It was subsequently dismissed on 13<sup>th</sup> August, 1997 after hearing interpartes.

Dissatisfied, again the applicant lodged an appeal in Court of Appeal which appeal was struck out on the grounds that the same did not incorporate a certified copy of the order appealed against. He followed up that set back by an application of extension of time to enable him file an appeal out of time which application was heard and subsequently and struck out but the applicant was granted leave to file a proper application if he deemed it necessary.

Subsequently, the respondent took out eviction proceedings and on 10<sup>th</sup> November, 2008, the eviction orders against the applicant were issued. The respondent in execution of the said orders demolished 3 units of 3 bedroomed residential houses that the applicant had put up in the suit premises.

Two years later on 8<sup>th</sup> July, 2010, the applicant again contacted the District Land Registrar, Nyamira so that he could confirm the boundary of the suit premises since he still believed that the earlier report of the District Surveyor was inaccurate. Following several communications between the District Surveyor and Director of Surveys, it was recommended that the District Land Registrar and surveyor, Nyamira District respectively, liaise with the respondent and applicant to determine the boundaries on the ground in consultation with the mutation documents. In compliance with the instructions, the District Surveyor came to the conclusion that as per the survey map, the residential buildings demolished by the respondent pursuant to the eviction order were in the suit premises. Accordingly this was according to the applicant, a new and important matter of evidence which was not within his knowledge or could not be produced at the time when the said judgment was delivered and a decree passed. It was on this basis that he was seeking that the judgment and decree of 24<sup>th</sup> April, 1997 and all other consequential orders be set aside. Otherwise the application had been made diligently, and without unreasonable delay in the light of the circumstances of the case and the protracted correspondence and communication between the department of survey and himself. No prejudice, again would be occasioned to the respondent if the orders sought are issued and it would also be in the interest of justice.

In response to the application, the respondent filed a notice of preliminary objection dated 12<sup>th</sup> May, 2011. The preliminary objection was to the effect that this court had become **functus officio** and hence could not hear or entertain the application. That the provisions of the law cited did not exist when the judgment was entered and hence they cannot operate retrospectively. Besides, Notice a preliminary objection, the respondent also filed grounds of opposition to the application. He stated therein that by this application, this court was being asked to sit on an appeal on a matter which had already been canvassed before the Court of Appeal. Thus this court was **functus officio**, the provisions cited in support of the application were inapplicable, the basis for review had not been established, the judgment was pursuant to a consent order, the application was **res judicata** and that litigation must come to an end.

When the application came before me for interpartes hearing, **Mr. Nyachoti** and **Mr. Nyariki**, learned counsel for the applicant and respondent respectively agreed to canvass the same by way of written submissions. They also agreed that the preliminary objection be dealt with first in this ruling. Subsequently they filed and exchanged written submissions together with relevant authorities which I have carefully read and considered.

The law on preliminary objection is clear and well settled. It was stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) E.A 696** by **Sir Charles Newbold P.** thus: “...*a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop...*”. In the same case, **LAW J. A** stated that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

The respondent’s preliminary objection is twofold; that this court is *functus officio* with regard to the application and secondly, the provisions of the law cited in support of the application are inapplicable. In support of the preliminary objection aforesaid, the respondent has submitted that this suit was heard and determined by this court on 24<sup>th</sup> April, 1997 when judgment was delivered in terms of the report and a decree thereafter issued. The applicant then made an application for review before this very court which was dismissed. The applicant then proceeded to the Court of Appeal, on an appeal which appeal was struck out. The applicant again went back to the Court of Appeal by way of an application to extend time within which to lodge a Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time. Again that application was struck out however with leave for the applicant to file a proper application should he deem it necessary. The applicant failed to take up the lifeline offered by the Court of Appeal as aforesaid hence, closed his chances to proceed with the appeal. In the premises therefore, by virtue of the provisions of section 7 of the **Civil Procedure Act**, this court has become *functus officio*. Secondly, this court cannot seat as an appeal court over a matter heard and determined by a court of concurrent jurisdiction. Finally, counsel submitted that the application was premised on the provisions of the law that did not exist as the time the suit was heard and determined. That it was settled law that an act of parliament, statute or the provisions of the constitution do not operate retrospectively, hence the provisions of law quoted are unavailable to the applicant in the instant suit since the suit was determined way back in 1997 before the provisions of section 1A and 1B of the **Civil Procedure Act** and the constitution came into force.

In response, the applicant has submitted that the preliminary objection raised by the respondent does not meet the threshold set by **Mukisa Biscuits** (supra) as the orders sought are clearly orders in which the court has been called upon to exercise judicial discretion. Furthermore, the grounds upon which review is sought are matters which need to be ascertained and as such the preliminary objection cannot stand since the applicant should be given opportunity to present his case. Though the respondent had stated in his preliminary objection that the court is *functus officio* and cannot hear the application, nonetheless the applicant had raised serious questions of law which cannot be wished away on flimsy and technical grounds such as advanced by the respondent. Finally, he submitted that the application was filed after the provisions of the new constitution and the **Civil Procedure Act** referred to in the application had come into force and effect. The application should therefore be decided bearing in mind these provisions of law which are now in full force and effect even though the dispute is an old one.

I think that there is tremendous force and merit in the first preliminary objection taken by the respondent. However, I cannot say the same of the 2<sup>nd</sup> preliminary objection. The 1<sup>st</sup> preliminary objection touches on the jurisdiction of this court to hear and determine this application. It is thus a jurisdictional issue. That is an issue which is not amenable to overriding objection of civil litigation and article 159(2) (d) of the constitution in the exercise of judicial power or authority. Jurisdiction, we have been told time and again, is everything in civil litigation. It is therefore not a mere procedural technicality that can be sacrificed at the alter of the overriding objective in civil litigation, the O<sub>2</sub> principle and or the

Oxygen principle. In a way therefore the applicants submission based on the overriding objective and the several authorities cited by the applicant in support thereof may be irrelevant in the circumstances of this case and indeed the application. Of course the overriding objective emphasizes the ultimate goal in civil litigation which is to do justice between the parties according to law. This objective is not to be compromised by undue rigidity in the application of procedural requirements which are ancillary to it. But since the question we are dealing with is one of jurisdiction, it is not a procedural technicality.

Further, I do not agree with the applicant that the preliminary objections raised do not meet the threshold set by **Mukisa Biscuits** case. It is common ground that the applicant filed a suit against the respondent which suit was eventually determined in favour of the respondent when judgment was entered in terms of Nyamira District Land Surveyor's report. It is also common ground that the applicant then sought a review of the said judgment on account of apparent error on the face of the record as the report was not signed by the District Surveyor and that it was not final and conclusive. That application was dismissed by **Mbaluto J.** on 13<sup>th</sup> August, 1997. The dismissal aforesaid elicited an appeal by the applicant which appeal was struck out. Undeterred the applicant filed an application for leave to file notice of appeal and memorandum of appeal out of time. That application was again struck out but the applicant was given a lifeline by the Court of Appeal to file a proper application which lifeline was not taken up by the applicant. Finally, the respondent executed the decree by evicting the applicant and demolishing the three houses he had put up on the suit premises. All these are uncontested facts. I do not therefore see, what else need to be ascertained so that the preliminary objection cannot stand in that regard. Yes, the applicant is calling upon this court to exercise its judicial discretion. However, such discretion cannot be exercised in vacum. The court must have the requisite jurisdiction before it cannot invoke its discretionary mandate.

What I understand the respondent to be saying is that having elected to proceed to the Court of Appeal in this dispute, he squandered the chance and or ousted this court's jurisdiction or mandate to handle this matter any further. Henceforth the matters could only be canvassed in the Court of Appeal and not otherwise. The decree arising from the judgment of this court having been executed, there is nothing left for this court to pursue. The applicant having knocked on the doors of the Court of Appeal and having been allowed in, he cannot again come back to this court and force open the doors of this court that had been permanently closed against him. His remedy now lies nowhere else apart from the Court of Appeal, and further on perhaps, in the Supreme Court as presently constituted. It is instructive that the doors of the Court of Appeal are still wide open for the applicant to vindicate his rights. Afterall, when his application for leave to file appeal out of time was struck out, he was simultaneously granted leave to file a proper application. By the act of the applicant moving to the Court of Appeal, he knew that this court had ceased to exercise jurisdiction over the suit and hence cannot come back again and reopen a matter that was subject of appeal. Thus this court is now not seized of the matter as it is *functus officio*. Again I do not think that it lies in the province of this court to revisit and reopen this case where a decree has been executed and satisfied fully.

I have no doubt at all in my mind that this is an application cleverly and or mischievously brought under the guise of the overriding objective, O<sub>2</sub> and or Oxygen principle. As the applicant acknowledges in his submissions having "*...filed an application for review of the judgment entered on 24<sup>th</sup> April, 1997 (this application) may not be allowed by the rules of the Civil Procedure and particularly order 45 of the Civil Procedure Rules, 2010...*". However, he counters this admission by stating that he has moved this court under sections 1A, 1B and 3A of the **Civil Procedure Act** as well article 159(2) (d) of the Constitution of Kenya. My simple answer to this submission is that section 1A, 1B and article 159 aforesaid on their own cannot find an application or a suit. They only buttress an application or a suit. They embolden the court to administer justice without undue regard to procedural technicalities. It cannot be a procedural technicality where a provision of law provides that once you file an application for review and is denied, you cannot file a similar application later. That is the position which obtains here.

In support of the application again, the applicant has called in aid, section 3A of the **Civil Procedure Act**. However, as we all know, that provision of the law can only be invoked where the **Civil Procedure Act** and the rules made thereunder are silent as to how to move the court in a particular matter. In other words, it can only be invoked where the civil procedure act and the rules made thereunder

has no specific provision as to how a party should move the court. In this case, the applicant is seeking a review of the judgment. He ought to have moved the court under order 45 of civil procedure rules. Indeed, he has even cited the said order in the application so that section 3A of the **Civil Procedure Act** is not available to him.

Even if I was to consider the application as a review and on merit, I would still have rejected it on the grounds that whatever has been advanced in support thereof is not new and important matter of evidence which was not within the applicant's knowledge and could not be produced by him at the time when the said judgment was delivered, a decree passed and executed. I say so because judgment was entered in the presence of the parties after the report had been read to them. Thereafter, the applicant filed an application for review. If the applicant had exercised due diligence, he would have availed the information he now claims to be fresh evidence to court. It is instructive in his earlier application for review, he based it on an apparent error on the face of the record. In the instant application he has shifted somewhat the goal posts. He now claims to have come by fresh information that could not be produced by him at the time. I do not think that courts should allow parties to file and argue applications in instalments. So that every time something new crops up, a party who had previously mounted an application for review and denied should be re-energized to file a fresh one. That way, there may be no end to litigation. It is in the interest of parties and indeed public policy that litigation must always come to an end, the sooner the better.

Finally, it is my considered view that, the initial application for review having been denied and then made a subject of appeal, if I was to entertain the instant application, I will somewhat be sitting on appeal of this court's earlier decision and being a decision of a court with co-ordinate jurisdiction, that will be an error.

On the whole I am satisfied that the 1<sup>st</sup> preliminary objection was well taken. I have of course in the course of crafting this ruling occasionally veered off the purport of the preliminary objection and dealt with other matters. However those matters are matters of law also captured by the parties to this suit in their respective written submissions. They have only helped to enrich my decision on the preliminary objection.

Accordingly, I uphold the respondent's 1<sup>st</sup> preliminary objection and strike out the application with costs to the respondent.

**Ruling dated, signed and delivered** at Kisii this 23<sup>rd</sup> day of September, 2011

**ASIKE-MAKHANDIA**  
**JUDGE**