



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Misc Appli 167 of 2005

**IN THE MATTER OF APPLICATION FOR ORDERS OF JUDICIAL REVIEW OF
MANDAMUS**

AND

**IN THE MATTER OF E.R. OBJECTION NO. 77 OF 1997 MADE ON AMWATHI
ADJUDICATION SECTION**

AND

REPUBLIC APPLICANT

VERSUS

DIRECTOR OF LAND ADJUDICATION

LAND ADJUDICATION OFFICER RESPONDENT

JOSPHAT MATIRI M'AMIRU APPLICANT

RULING

The *ex parte* applicant sought order of mandamus to compel the respondents to implement their decision in objection number 77 of 1997 by his notice of motion dated 23/11/2005. After hearing the *ex parte* applicant and the interested party, this court delivered its judgment on 16th July 2009. The *ex parte* applicant has now moved to this court by his notice of motion dated 28 July 2009 which is the subject of this ruling. By that application, he seeks an order of review of the judgment dated 16th July 2009 and the

setting aside of the said judgment and in its place to be substituted with an order granting the prayers sought in the notice of motion dated 23rd November 2005. The *ex parte* applicant faulted the judgment on the ground that the court did not see what he called his disposition in his judicial review application. In his supporting affidavit to the application for review, he deponed as follows:-

“The parcels sought to be recovered included number 2919 – 210 acres Mwathi Adjudication section Maua in Meru North District and family shares with 0.10 acres and 0.20 father and mother cemetery of Ameru family shares (sic).

The matter was heard and the respondent made decision on 8th April 1998 vide applicant verifying affidavit. The decision made was to the effect that the parcel number 2919 be divided into two 050 acres to owned by the applicant and the balance of the same parcel be registered in the applicant name on behalf of his father M’Amiru – deceased family. (sic).”

The decision alluded to in those paragraphs of the *ex parte* applicants affidavit was not annexed to this application and was not also annexed to the judicial review application. Indeed it is of use to quote from the judgment delivered on 16th July 2009 in part as follows:-

“The ex parte applicant on 16th November 2005 obtained leave to file that Notice of Motion. In the application for leave, the ex parte applicant stated in his verifying affidavit that he was annexing the decision he sought its implementation. However in perusing the court records, I was unable to trace that decision. Indeed the matter was not clear to me what the ex parte applicant was seeking until I considered the interested party’s replying affidavit. The interested party deponed that he is the owner of parcel No. AMWATHI/MAUA/2919. He purchased this land from the ex parte applicant’s father some 30 years ago. The transfer was officially carried out through the land adjudication committee. The ex parte applicant therefore, according to the respondent, had no locus standi since the objection to that registration should have been filed by his father.”

I am of the view that the application before court cannot be entertained on several grounds. First is that when a party approaches the court seeking the review of a judgment or an order, it is encumbered in that party to extract the order or the decree which is sought to be reviewed. It is on extracting such an order that the court would be able to determine the source of the party’s grievance. This was found to be the case in the case of Jivanji vs. Jivanji & Ano. [1929 – 30] 12 KLR 44 The Court of Appeal for Eastern Africa held:-

“.....the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review under Order XLII. A person applying for a review under that Order must be “aggrieved by a decree or order.” The words “decree” and “order” are here used in the sense set out in the definitions in Section 2 of the Civil Procedure Act. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be a review of the judgment upon which it is based. ButHowever aggrieved a person may be at the various

expressions contained in a judgment or even at various rulings embodied therein, unless the person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The *ration decidendi* expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit. In these proceedings no resultant decree on the 29th August, 1930, has yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue the formal decree or orders.”

From the above case, it is clear that the *ex parte* applicant application for review would fail. In addition, I am of the considered view that what the *ex parte* applicant is seeking is indeed an appeal from this court’s judgment rather than a review. Ringera, J. as he then was, in the case of The Eastern and Southern African Development Bank Vs. African Green Fields Ltd & Others High Court Civil Suit No. 1189 of 2000 aptly stated after analyzing a review application that:-

“I am tempted to say that although the plaintiff’s application has the face of a review application, it has the heart of an appeal.”

That would indeed be my finding in respect of the present application. The *ex parte* applicant has not produced before court any newly discovered evidence which can be the basis of granting a review. He has regurgitated the same issues that were before the court during the judicial review application and just as he failed to annex vital documents to the judicial review application, he also has failed to annex the same in this application. One wonders whether that decision exists. If the *ex parte* applicant is of the view that the court failed to consider his arguments, the correct venue to go is to the Court of Appeal. For that reason also, this application fails. But I believe the most damning ground why this application cannot be entertained is because he has sought to rely on Civil Procedure Rules in a judicial review matter. It has severally been held that judicial review is a special jurisdiction and it cannot borrow from other procedures other than what is provided for in Order LIII of the Civil procedure Rules. Hon. Mr. Justice M. S. A. Makhandia had this to say in the case Dickson Miricho Muriuki Vs Central Provincial Land Disputes Appeal Committee & 6 Others Misc. Civil Application No. 112 of 2008:-

“There are several Court of Appeal and High Court decisions dwelling on the applicability of the provisions of the Civil Procedure Act and the rules made thereunder in Judicial Review Proceedings. In Commissioner of Lands Vs. Kunste Hotel Ltd [2006] KLR 249, the Court of Appeal held that judicial review is a jurisdiction which is *sui generis* (it is neither criminal or civil). Accordingly, Civil Procedure Act and the rules made thereunder were inapplicable. In Ndete Vs. Chairman Land Disputes Tribunal & Another [2002] KLR 392, Ringera J. (as he then was) stated that under the Civil procedure Rules, Order LIII is a special jurisdiction as the rules therein are not made under the Civil procedure Act but under the provisions of section 9 of the Law Reform Act and in that regard order VI Rule 12 of the Civil procedure Rules that had been cited in the course of arguing the application was not applicable in arguing the proceedings brought under Order LIII which is promulgated in pursuance of the provisions of section 9 of the Law Reform Act. Ringera J. again reaffirmed this position in Welamondi Vs. The Chairman Electoral Commission of Kenya [2000] 1 KLR 486 by holding that in exercising powers under Order LIII, the court is neither exercising civil or criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis*. It therefore followed

that it was incompetent to invoke section 3A and order 1 Rule 8 of the Civil Procedure Rules and Sections 42, 79 and 80 of the Constitution of Kenya. Bearing all the foregoing in mind, I am of the persuasion that the Civil Procedure Act and the rules made thereunder are inapplicable to judicial review proceedings instituted pursuant to Order LIII of the Civil procedure Rules.”

I believe I have said enough to show that the *ex parte* applicant application dated 28th July 2009 is incompetent and I hereby dismiss the same and order the *ex parte* applicant to pay the costs of the interested party Pharis Nyaga.

Dated and delivered at Meru this 6th November 2009.

MARY KASANGO

JUDGE