



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 12 of 2003**

AHMED ALI GURE ..... APPELLANT  
VS.

DAUD SETHE DIFF ..... RESPONDENT

**RULING**

The appellant/applicant has moved the court by way of a Notice of Motion dated 15<sup>th</sup> July, 2009 under Sections 3A, 80, 63(e) of the Civil Procedure Act and Order 44 Rules 1(1), 2, 3(2) and 4(1) and Order 1 Rule 1 of the Civil Procedure Rules for the following Orders:

1. That the court be pleased to stay the execution of the court orders given on 8<sup>th</sup> May, 2008 together with a decree thereon issued on 12<sup>th</sup> May, 2008.
2. That the court be pleased to review and set aside the orders of Hon. Lady Justice Mary Ang'awa made on May, 2008 together with a decree thereon.
3. That the court be pleased to order the maintenance of the status quo ante on the disputed land as at 26<sup>th</sup> October, 2001 pending re-planning, surveying and marking of the disputed area by the Government Department of Physical planning.

the reasons for the said orders are set out the face of the application and also an affidavit by Ahmed Ali Gure, the appellant herein.

The application is opposed and both counsel have filed submissions thereto.

The respondent has filed a Notice of Preliminary Objection on the basis that the application is frivolous, vexatious and abuse of the process of the court and does not lie. It is also the respondent's case that the application is *res judicate* and that this court has no jurisdiction to entertain the application. Finally that, this court has become functus officio over the said matter.

I have read the record and also the cited authorities. Section 78 of the Civil Procedure Act reads as follows:

***“78 (J) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power***

- (a) to determine a case finally;***
- (b) to remand a case;***
- (c) to frame issues and refer them for trial;***
- (d) to take additional evidence or to require the evidence to be taken;***
- (e) to order a new trial.***

***(2.) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”***

Additionally, section 80 of the same Act reads as follows:

***“80. Any person who considers himself aggrieved-***

- (a) by a decree or order from which no appeal is allowed by his Act, but from which no appeal has been preferred; or***
- (b) by a decree or order from which no appeal is allowed by the 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.”***

I have read these two sections in line with Order XLIV of the Civil Procedure Rules as relating to review applications and in particular sub-rule 1.

This matter was handled by the High Court in its appellate jurisdiction. It was not the judgment of this court that is being challenged, rather the proceedings that led to the appeal herein. It would appear to me that sections 78 and 80 aforesaid do not confer upon this court the power to review a judgment delivered on appeal. This is because the powers this court exercises in its appellate jurisdiction are specifically set out in section 78(1) aforesaid. Section 78(2) is subject to the provisions of subsection (1) and does not aid the applicant.

The right position in my view is that, any party aggrieved by an order on appeal by the High Court should pursue the same in the Court of Appeal which then has appellate jurisdiction to correct any adverse situations that may be complained of by any party. I again support the fact that, this is not a court of 1<sup>st</sup> instance as far as appeals are concerned and, it does not have original jurisdiction in respect of applications of this nature. The court has therefore become functus officio and it would be against the norms and principles of law to revisit what it has concluded. In

fact this will lead to prejudice against the respondent.

I am persuaded therefore that, I have no jurisdiction to entertain an application of this nature but, this is not to say that the appellant's doors are closed. There is definitely room for him to pursue the matter in the Court of Appeal where all the matters related to the proceedings herein may be addressed. Accordingly this application is dismissed with costs to the respondent.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of December 2009.*

**A.MBOGHOLI MSAGHA**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Mutisya for the Applicant

Mr. Marete for the Respondent