



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**Civil Appeal 41 of 2002**

**LEONARD NJERU MUGERA.....APPELLANT**

**VERSUS**

**MARGARET MUTHONI MUGERA.....RESPONDENT**

**JUDGMENT**

This Appeal is against a ruling dismissing an application for Review of a court order under order 44 Civil Procedure Rules. The Trial Magistrate found that the requirements under order 44 Civil Procedure Rules not complied with namely:-

1. that no discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made.
2. or on account of some mistake or error apparent on the face of record was to be proved.
3. or for any other sufficient cause.
4. without unreasonable delay may apply for a review.

The Trial Magistrate proceeded to make a finding that the want of jurisdiction is a matter of law which constitutes a proper ground of appeal and further "he would not have jurisdiction to grant orders sought for to do so would amount to presiding over appeal against his own decision" The application was then dismissed.

The main grounds of Appeal are numbered 2, 3, 4, 5 that the Trial Magistrate erred in law and fact in disregarding the fact that there were sufficient grounds under order 44 (1) CPC to allow the application for review and by disregarding the fact that he had jurisdiction under Magistrates Act to hear and determine the application and that he disregarded the fact that the Land Disputes Act Section 13 bars the tribunals from hearing disputes that have been determined by court, matters relating to titles to land and matters relating to determination of trusts, that the parcel of elders decided on a matter they did not have jurisdiction. And that the Trial Magistrate ignored the fact that the Respondent lacked Locus standi.

From a perusal of the record this dispute arose from an order of Central Land Disputes Tribunal made on 11/1/2002 awarded the Respondent ½ acre of land out of parcel No. Inoi/Kerugoya/871. This award was entered as Judgment of the court. Therefore the Respondent applied for order to execute and enforce the Judgment of court in her application dated 15/4/2002. The application was allowed on 25/6/2002.

Thereafter the Appellant employed the services of advocate Magee & Magee who applied for stay of orders of execution (dividing the land and giving the Respondent ½ acre).

It is the ruling of this application that is now subject of this appeal. The application was disallowed on the main ground stated above

In his submissions counsel for Applicant submitted that the award entered as Judgment of court was unlawful because the Tribunal did not have jurisdiction to determine the same under Act 18/1990. And that in the proceedings it is shown that the matter had been heard in court on Succession Cause No. 30/1981 at Kianyaga and therefore under Section 13 of that Act the Tribunal is prohibited from hearing such matters. And that although the Respondent was claiming for Mary Wambui Mugeru (deceased) she was not a legal personal representative. The Trial Magistrate did address his mind to the requirements of order 44 (1) however he did not consider the last requirement namely....Whether there was other sufficient reason to warrant and order for review. The want of jurisdiction mentioned in his ruling was not regarding his dealing with his jurisdiction but was regarding the jurisdiction of the Tribunal to deal with the matter firstly because it was dealing with the ownership of registered land jurisdiction of Land Disputes Tribunal as set out under Section 3 of that Act. Dealing with the ownership is not one of the powers granted by the Act.

Therefore that is a sufficient ground to consider the review of the application. Secondly if indeed the dispute between the parties had been decided by a court of law Section 13 of the Act prohibits the Tribunal from opening it up again. This is another reason that should be considered as “sufficient reason” The trial magistrate did not consider the same. The trial Magistrate finding that he did not have jurisdiction to grant orders of review for to do so would amount to entertain and “presiding over appeal against my own decision” was erroneous.

The appellant has raised the issue of the locus standi of the Respondent. In Tribunal Proceedings she was claiming as beneficiary. In the same proceedings the Appellant informed the members of Tribunal that he was registered as trustee and that portion Inoi/Kerugoya/871 was registered in the name of appellant and Mary Wambui Mugeru the mother of the Respondent herein. The appellant proposed that a portion be registered in the joint names of Appellant and the Respondent. That is the evidence he gave.

In the circumstances there is no issue of the Respondent lacking status. She was claiming as beneficiary from her father and from her mother. The appellant admitted being her trustee. The principle that the Tribunal would not deal with ownership of registered land is supported by the proposition that the law relating to registered land guaranteed absolute title to the registered proprietor. And those rights cannot be taken away without sufficient cause. In this case the Appellant admitted freely that he was a trustee.

It is my finding that the Judgment of the Tribunal was correct according to the evidence placed before it. In the case of Succession No. 30/81 the decision was regarding the original land parcel No. Inoi/Kerugoya/244 therefore the land Disputes Act 18/90 Section 13 is not applicable. The trial Magistrate did not even consider this issue. The outstanding issue is whether the Tribunal had Jurisdiction to determine the dispute on a registered land under the Registered Land Act Cap.300. This is clearly stated under the Section 59 Registered Land Act. Moreover the rights of the Respondent are not disputed. The Tribunal’s duty was to decide and authorize the proposed division in the circumstances the Tribunal land jurisdiction to deal with the matter.

It is my finding therefore that the Trial Magistrate did make serious errors and did fail to apply the law and procedure under order 44 (1) Civil Procedure Code.

I therefore allow this appeal set aside the dismissal of the application made on 11/9/2002 appealed against. I order that the application be reheard by another court.

No order as to costs as it appears the application was not opposed.

Dated this 7<sup>th</sup> April, 2008.

**J. N. KHAMINWA**

**JUDGE**

**7/4/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Magee for Chomba**

**Respondent in person**

Read in open court.

**J. N. KHAMINWA**

**JUDGE**