REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 103 of 2003

JOSEPH NDERITU WAMAITHA……..……APPELLANT

VERSUS

JOSEPH NDUNGU NJOROGE

NJUGUNA GATHIGANI

NGATIA GICHUHI……. RESPONDENTS

RULING

The Appellant's appeal was heard by this court by way of Written Submissions on 25th September 2007. The court delivered its judgment dated 14th November 2007. The Appellant has now approached the court by way of Notice of Motion dated 11th December 2007 seeking the following prayers:-

"***1. That there be a stay of execution of the decree and judgment delivered herein on 14th day of November 2007 pending the hearing and the determination of this application.***

2. That this honourable court be pleased to review its orders delivered on 14th day of November 2007."

When the matter came up for hearing before court on 6th March 2008 the appellant's advocated argued prayer number two only. The argument of the appellant in support of that application was that by the appeal the appellant had sought that the judgment of the Principal Magistrate issued on 14th August 2003 be set aside. The argument was that the judgment of this court of that appeal did not fully address the issues raised in the Memorandum of Appeal and those raised by the advocate in support of that appeal. That the judgment failed to note that the award of the Provincial Land Dispute Appeal's Committee Central Province did not provide for the acreage that the respondents were to get. That it was that award which the appellant was appealing against. The appellant argued that in this court's judgement of that appeal the court had paid regard to the award of the District Land Dispute rather than taking to consideration the appeals committee award.

I have had occasion to go through the Record of Appeal. The index of that record shows that the decree of the lower court dated 20th September 2001 was listed on page 20 (twenty). Going through that Record of Appeal that is the only decree that was before the court as the court considered this appeal. That decree on page 20 clearly shows that the respondents' acreage was indicated. I have looked at both the record of appeal and the lower court's file and I was unable to find a decree relating to the appeal's committee. If indeed it is correct that the court wrongly paid attention to the wrong award then the error emanated from appellant himself who only attached one decree which was considered. It therefore follows that this court cannot consider the review which is sought. But perhaps of more concern is that the appellant in seeking a review failed to extract the order or decree to which he sought a review. That

failure also makes the application to be fatally defective. In support of that finding a case in point is *JIVANJI VS JIVANJI & ANR (1929-1930)12 KLR 44*. In that case the Court of Appeal for East 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 XLIV. 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 for a review of the judgment upon which it is based. But …… however aggrieved a person may be at the various expression 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 XLIV appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio 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 order."***

As can be clearly seen from that passage it was imperative for the appellant to extract the Order or Decree from which the review was sought. Having failed to do so makes the application for review to be fatally defective. In conclusion the appellant's Notice of Motion dated 11th December 2007 is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 5th day of May 2008.

MARY KASANGO

JUDGE