REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Misc Civ Appli 171 of 2001

CHOGORIA TOWN COUNCIL.………………….………………… APPLICANT

V E R S U S

ALICE M. NYAGA…………………………..………………..RESPONDENT

R U L I N G

1. The Application dated 24.7.2006 is premised on Order XLIV Rules 1,2 and 3 of the Civil Procedure Rules and therefore points to an order of review but in its body it seeks orders to include the setting aside of the orders of 12.3.2002 and 11.4.2002 and further that the Appeal herein be struck out. For purposes of this Ruling I will restrict myself initially to the orders of review as arguments of counsel also rotated around the same issue.

2. The background to the Application is that on 11.4.2002 the party called the "Plaintiff" in this Miscellaneous Civil Application which is the Respondent to this Application and invoking Order XLIV Rule 5 of the Civil Procedure Rules as well as s.3 and s.3A of the Civil Procedure Rules sought extension of time to file an appeal from the decision of the Eastern Provincial Land Disputes Appeals Committee in its Appeal case No. 151/2000. On 18.4.2002, Mulwa J. recorded orders by consent as follows:

"By consent of the counsel *(sic)* the application dated 10.4.2002 be allowed. The Applicant to file his appeal within 14 days"

3. The Appeal was filed on 22.4.2002 as HCCA 30/2002. Apparently an earlier order dated 12.3.2002 extending time to file the Appeal had not been complied with hence the latter order by consent but for purposes of this Ruling obviously only the latter order is of substance.

4. The grounds on which the Application are brought are:-

"(a) The application which gave rise to the orders was incompetent and bad in law.

(b) The court had no jurisdiction to give the orders sought under the provisions cited.

(c) The entire proceedings were a nullity and illegal.

(d) The Appeal purportedly filed based on the orders thereof is incompetent and is a nullity.

(e) The Appeal was filed out of time vide the provisions of Land Dispute Tribunal Act and there is no provision for extension of time or stay in the High Court.

(f) The Respondent has refused/failed to prosecute the appeal since 22/4/2002 or take any step as it enjoys the stay orders to the prejudice of the applicant who has no road of access".

5. The Supporting Affidavit and submissions by the Advocate for the Applicant are along the same lines and I see no need to reproduce them.

6. In opposition the Respondent in its grounds of opposition and in submissions by counsel argues that the conditions for review have not been met and that the Application has been brought after clearly unreasonable delay and that the Applicant ought to file an Appeal and not seek review.

7. For my part, the first question to address is whether an order of review is available to the Applicant. Order XLIV rules 1,2, and 3 which have been invoked provide as follows

"<u>Order XLIV</u>

Rule 1 (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

'Rule 2 - A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.'

2. An application for review of decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

Rule 3(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation".

8. Neither of the grounds for review in these Rules have been cited by the Applicant and it is not my place to speculate from the grounds stated above on what ground the Application is brought and to that extent I agree with Counsel for the Respondent that the Application is incompetent.

9. The second question is whether in fact there was a consent order recorded on 18.4.2002 by Mulwa J. Although not raised by any party, it is my duty to point out any anomaly on the record because the record is a record of this court and not the parties. I say this because on 18.4.2002 the record reads as follows:

" Coram Kasanga Mulwa J.

C.C. Mwirigi

Ruthugua for Applicant

We have agreed with Mr. Gitonga that the Application be allowed.

COURT: By consent of the counsel the Application dated 10.4.2002 be allowed. The applicant to file his appeal within 14 days."

10. I have not seen any record to show that Mr. Gitonga was in court on that day although he was in court on 12.3.2002 when the prior Application for extension of time was heard. There is even no record that Mr. Gitonga was served with the latter Application allowed by "consent" on 18.4.2002.

11. This being the case and in spite of my holding that the Application for review is not merited because the Applicant has not properly placed himself within the purview of Order XLIV of the Civil Procedure Rules nonetheless Order XLIX Rule 5 of the Civil Procedure Rules provides as follows:-

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by parties making such application, unless the court orders otherwise".

12. The application made on 11.4.2002 in view of the above Rule ought to have been served and I have said that there is no evidence of service on record and since in fact the advocate for the Respondent to it was not recorded as being present no proper consent could have been recorded on 18.4.2002 allowing the Application for extension of time. In that regard this court must invoke s.3A of the Civil Procedure Act which provides as follows:-

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

13. It is the duty of any court confronted by an injustice to ensure that justice is done and the court process is not abused to the prejudice or even advantage of any party. This case to me seems one case where s.3A above is clearly applicable.

14. While I must dismiss the Application dated 24.7.2006 with costs to the Respondent, it behoves this court to make the following orders:

15. The orders of court made on 18.4.2002 are hereby set aside and the Application dated 11.4.2002 is to be heard de novo by any other judge other than myself for reasons that I have already been partly seized of it and my mind may be clouded thereby.

16. Secondly, the Appeal filed pursuant to the grant of that Application i.e.30/2002 must be struck out for reasons that the leave to file it has been set aside. If the leave is re-granted, the applicant will have the chance to file it again and if not the matter comes to an end.

17. In view of the age of both the Application dated 11.4.2002 and HCCA 30/2002 I shall order that parties now do take early dates for the application.

18. Orders accordingly.

Dated, signed and delivered in open court at Meru this 26th day of April 2007.

ISAAC LENAOLA

JUDGE

In The Presence Of

Mr. C. Kariuki Advocate for the Appellant

N/A Advocate for the Respondent

ISAAC LENAOLA

JUDGE