

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 137 of 2003

MURAYA WANDUNGU.....PLAINTIFF

VERSUS

NAOMI WANJIRU WANDUNGU.....DEFENDANT

RULING

By way of this Notice of Motion dated 26th July 2006 and expressed to be brought under Order XLIV Rule 1 and 20 and 15 of the Civil procedure Rules and Section 3A of the Civil procedure Act the Plaintiff seeks orders that this Honourable Court be pleased to review, vary and/or set aside its orders made on June 2006 dismissing the Plaintiff's suit.

The application is based on the following grounds:-

- (a) That there is an error on the face of the record
- (b) That there is sufficient reason to justify review
- (c) That it is fair and just to grant the application

The application is also supported by an affidavit sworn by the Plaintiff on 26th July 2006 in which he avers that he did not consent to the dispute being referred to the Tribunal and that he did not participate in the proceedings.

That notwithstanding the award of the Tribunal was confirmed and adopted as the judgment of the court by the Senior Resident Magistrate Nakuru. The plaintiff applied to the High Court for Judicial Review in Misc. Application No. 63 of 2001 which application was dismissed by Rimita J. The Plaintiff appealed to the Court of Appeal being Civil appeal No. 330 of 2001 for stay of execution pending appeal which appeal was dismissed.

The following are the stages where a matter relating to the jurisdiction of the Tribunal is concerned. The unwilling party can object to the referral by the magistrate and if the objection is dismissed, he is obliged to attend the proceedings and if he fails to attend the matter can proceed in his absence. That is what we call constructive surrender. He can then challenge the decision of the Tribunal before the same is confirmed and adopted as judgment of the court. And if the award is confirmed and adopted as judgment of the court an appeal can be preferred to the High Court and to the Court of Appeal.

The party who loses at the Court of Appeal like in the instant case being the highest court of the land and tries to file any other matter in respect of the same subject premises in any other court is expecting that some day a miracle will happen.

The Plaintiff having challenged the decision of the Tribunal at the High Court as well as the Court of Appeal, and lost and the instant suit being between the same parties and over the same subject matter is obviously res judicata and therefore untenable.

The application for review is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of April 2007.

J.L.A. OSIEMO

JUDGE