REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

CIV MISC APPLI 157 OF 2000

MUTIGA KARATU ……...……. APPLICANT

VERSUS

ELIZABETH MUREGI MATHEW ……. RESPONDENT

RULING

The application before me seeks, in the main, an order for review of this court's (Tuiyot,J) *exparte* orders granted on 11th January, 2001 in which the respondent was granted leave to appeal out of time. The applicant avers that the court had no jurisdiction to entertain the respondent's application for leave to appeal out of time from a decision of Land Dispute Tribunal.

It is further argued that the application was fatally defective having been brought by Originating Summons. Finally the applicant argues that after obtaining judgment he executed the same by partitioning the suit land and registering it in his name, hence the appeal will serve no purpose as it has been overtaken by events.

For those reasons he pleads with the court to declare the appeal filed pursuant to the leave granted on 11th January, 2001 null and void. The respondent has filed grounds of opposition in which she contends that no grounds for review has been shown on the face of the application; that the High Court had original jurisdiction to grant leave for filing an appeal out of time; that the applicant is guilty of delay in filing this application.

These grounds were canvassed before me on 9th July, 2007. The application is expressed to be brought under Section 80 of the Civil Procedure Act and Order 44 rules 1, 2 and 3 of the Civil Procedure Rules.

Section 80 provides;

"80. Any person who considers himself aggrieved –

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

(b) by a decree or order from which no appeal is allowed by this 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"

An appeal is allowed as of right from a decision made under Order 49 Rule 5 of the Civil Procedure Rules (enlargement of time). No appeal has been preferred and therefore the condition set out in Section 80 has been satisfied.

Section 80, it must be noted, is the substantive law. The procedure and details thereof is provided for in Order 44, which limits the grant of orders of review to three circumstances, namely the discovery of a new and important matter; the existence of some mistake or error apparent on the face of the record or for any other sufficient reason.

The application, as correctly observed by learned counsel for respondent is not specific as to the ground upon which it is brought, i.e. whether the applicant has discovered a new and important matter or evidence, or whether there is an error or mistake apparent on the face of the record-or for any sufficient cause.

In any case I see no important matter or evidence that the applicant has just discovered in this application. The fact that this court (Tuiyot,J) granted leave to file the appeal out of time, when in the applicant's view, he lacked jurisdiction, cannot in itself be construed to constitute an error on the face of the record.

Although the court has wide powers in matters of review of its orders and decrees, that discretion, like all other discretions must be exercised judicially.

The last ground for review "any other sufficient cause" donates wide discretion but that discretion must be based on sound reason. I find no sufficient cause to review the orders in question.

A distinction must be drawn between a review and appeal. That distinction was saciently stated in the Uganda case of Belinda V Kangwama & Another (1963) as follows;

"A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view for evidence or law is no ground for review though it may be a good ground for an appeal"

In Mulla on the Indian Code of Procedure, 13th Edn. Page 1672 a similar statement is made;

"A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simplicitor and an error apparent on the face of the record may sometimes be thin. It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established"

Indeed Rule 2 of Order 44 gives two examples of what may be considered an error on the face of the record, namely, clerical or arithmetical mistake.

If indeed the court had no jurisdiction in entertaining the application and thereby the applicant was aggrieved his recourse is to appeal. In the result I find no merit in this application which I hereby dismiss with costs to the respondent.

Dated and delivered at Meru this 11th day of October, 2007

W. OUKO

JUDGE