



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT KERICHO

Civil Suit 32 of 2003

MATHEW KIPNGENO ARAP CHELULE ..... PLAINTIFF

VERSUS

STEPHEN LOGOS ..... 1<sup>ST</sup> DEFENDANT

BOMET DISTRICT LANDS REGISTRAR ..... 2<sup>ND</sup> DEFENDANT

RULING

The 1<sup>st</sup> defendant in this case is a very persistent and determined litigant. On the 10<sup>th</sup> of December 2004, this court entered judgment against him in a suit which was filed by the plaintiff. The suit concerned the determination of a boundary and a road between the parcel of land owned by the plaintiff and the 1<sup>st</sup> defendant respectively. This court entered judgment against the 1<sup>st</sup> defendant after it was satisfied that the 1<sup>st</sup> defendant was properly served with summons to enter appearance. He however did not enter appearance and interlocutory judgment was entered against him. The plaintiff thereafter proved his case on formal proof leading to the judgment of 10<sup>th</sup> of December 2004. According to the plaintiff, after extracting the decree, this court's judgment was given effect to by the Bomet District Land Registrar.

It is when the plaintiff sought to execute against the 1<sup>st</sup> defendant on his costs, that the 1<sup>st</sup> defendant was galvanized into action. He filed an application under **Order XXI Rule 22** and **Order IXA Rule 9 and 10 of the Civil Procedure Rules** seeking to have the judgment entered against him set aside. The said application was made on the 10<sup>th</sup> of February 2006. The application was opposed by the plaintiff and it was argued before this court on the 5<sup>th</sup> of June 2006. In its ruling delivered on the 8<sup>th</sup> of June 2006, this court stated as follows concerning the said application by the 1<sup>st</sup> defendant:

*“This court can however still set aside the exparte judgment if it is satisfied that the interest of justice would be served. In the present case, the plaintiff has deponed that the judgment of this court has already been given effect to by the 2<sup>nd</sup> defendant and any effort to have the said judgment set aside would be counter productive. I agree. This case relates to determination to a boundary of a public road. What the plaintiff is contending is that the boundary of the public road on the ground should reflect what appears on the registered indented map of the area (R.I.M). Since this adjustment has been done on the ground, it would serve no useful purpose to have the dispute herein reopened.”*

The 1<sup>st</sup> defendant was apparently dissatisfied by the said ruling of this court and proceeded to make yet another application under the provisions of **Order L rule 1, XLIV rules 1 (i) and (2), XXI rule 22 (1) of the Civil Procedure Rules and Sections 3A and 80 of the Civil Procedure Act** seeking to have the ruling of this court reviewed and/or set aside on the grounds that this court had been misled into believing that the Bomet District land Registrar had already demarcated the boundary between the two disputed parcels of land and the road passing through them. In essence, the 1<sup>st</sup> defendant is stating that this court was mistaken when it ruled that the dispute between the plaintiff and the 1<sup>st</sup> defendant had already been resolved when the judgment of this court was given effect to by the District land Registrar. The plaintiff opposed the application.

The application was argued before me by Mr. Kirui on behalf of the plaintiff and by Mr. Siele on

behalf of the defendant. I have considered the pleadings filed by the parties in support of their respective cases in respect of this application. I have also considered the rival submissions which were made before me. The issue for determination by this court is whether the 1<sup>st</sup> defendant has established such a case as to entitle this court to grant him the order of review sought. According to **Order XLIV rule 1 of the Civil Procedure Rules**, an application for review may be made by any person who is aggrieved by a decree or order of the court provided he proves that he has discovered a new and important matter which was not within his knowledge at the time the suit was heard. He may also seek to review the decision of the court if he discovers some mistake or error apparent on the face of the record. Finally, he may apply to review the judgment of the court for any sufficient reason.

In this case, the 1<sup>st</sup> defendant has submitted that this court erred when it ruled that the Bomet District Land Registrar had already given effect to the judgment of this court. Is this a sufficient reason in law that an aggrieved party can apply for an order of review from this court? In my considered opinion, I do not think so. I think the 1<sup>st</sup> defendant is trying to have a second bite of the cherry. The reasons he is advancing in support of this application for the review of the ruling of this court, are substantially the same reasons that he placed before this court when he made the application to set aside the exparte judgment. The plaintiff argued at the time that the application was overtaken by events because this court's judgment had already been given effect to on the ground by the District Land Registrar.

The 1<sup>st</sup> defendant had an opportunity to present his side of the case when the application to set aside the exparte judgment was argued before this court. If the 1<sup>st</sup> defendant was therefore aggrieved by the said decision of this court in refusing his application to set aside the exparte judgment, he was at liberty to exercise his constitutional right of appeal to the Court of Appeal and not seek to re-litigate the same issue before this court. I think the 1<sup>st</sup> defendant is being unfair in asking this court to sit on appeal against its own ruling. The issues raised by the 1<sup>st</sup> defendant in this application for review are actually issues which ought to be canvassed and argued before the Court of Appeal. The grounds advanced by the 1<sup>st</sup> defendant in support of this application do not fall within the ambit of **Order XLIV of the Civil Procedure Rules**. I think the 1<sup>st</sup> defendant is re-arguing his application to set aside the judgment of this court by the back door through the dubious route of making an application for review.

The upshot of the above reasons is that this application filed by 1<sup>st</sup> defendant lacks merit. The same is dismissed with costs to the plaintiff. The 1<sup>st</sup> defendant is advised to pursue an appeal to the Court of Appeal if he was dissatisfied by the ruling of this court dismissing his application to set aside the exparte judgment. That is the right thing for him to do. His determination and persistence in pursuing his claim in this court is therefore misguided and out of touch with the existing rules of civil process.

**DATED at KERICHO this 30<sup>th</sup> day of October, 2006.**

**L. KIMARU**

**JUDGE**