REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 115 of 2001
BETWEEN

ABISHAGHI RUFUS …… APPELLANT/RESPONDENT

AND

FRANCIS IRERI JOTHAM …….. RESPONDENT/APPLICANT

RULING

The application before me is the Chamber Summons dated 25.7.2003 brought under Order 44 Rules 2 and 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The application is for the following orders:

1. That the judgment made on 3.7.2003 by the Honourable Justice Kasanga Mulwa be set aside and/or vacated.

2. That all the subsequent consequential orders be set aside and/or vacated.

3. That there be a stay of execution of orders granted by Justice Kasanga Mulwa pending the hearing and determination of this application.

4. That the costs of this application be in the cause.

The application is premised on nine grounds on the face thereof, and it is also supported by the affidavit of one Francis Ireri Jotham in which he has deponed that he is the legal proprietor of L.P. No. KIERA/EAST MAGUTUNI/555 which he bought from Lloyd Mugendi Muketha, the registered owner.

That after completion of the purchase, the respondent demanded his land back and that the applicant's refusal to return the land to the respondent led to the filing of Land Disputes Tribunal Case No. 15 of 2000. That subsequent thereto, the tribunal award was filed at the Chuka Law Courts.

The application is opposed. The respondent filed a replying affidavit dated 28.8.2003 on the ground that there are no new matters to warrant the granting of the orders sought. That the Land Disputes Tribunal award has not yet been delivered and that the applicant has not exhausted all the avenues open to him.

Briefly the facts from the somewhat confused record are that on 8.1.2000, the two parties entered into an agreement for the sale of land parcel No. 555 Magutuni East (suit land) for the sum of Kshs. 250,000/=

(two hundred fifty thousand) out of which Kshs. 145,000/= was paid on execution of the agreement and balance was to be paid on exchange of the certificate of title. When a dispute arose between the parties the matter was referred to the tribunal and an award made. The award was read to the parties in civil (land) No. 35 of 2001.

On 3.9.2001, the parties again appeared before the court and Mr. Kibera for the respondent raised a preliminary objection on the ground that the court had no jurisdiction to deal with the matter other than just reading the award. The applicant had filed a chamber application dated 29.6.2001 in which he sought the dismissal of suit No. 35 of 2001 and a declaration that the plaintiff (respondent) lacked the locus standi to institute the suit and that the tribunal award filed in court was a nullity. That application was allowed by the court. The appellant/respondent has appealed against that ruling.

Mr. Njue for the applicant contended that the application dated 29.6.29001 before the Chuka SRM had no legs to stand on particularly because the applicant therein had no locus standi. Secondly that the land that the respondent purports to claim belongs to the respondent's grandson and the applicant bought the land for valuable consideration from the registered owner. Mr. Njue relied on sections 27 and 28 of the Registered Land Act (R.L.A.). Mr. Njue also relying on section 3A of the Civil Procedure Act urged the court to review the orders made by the court on 3.7.2003 so as to meet the ends of justice.

Mrs. Ndorongo for the respondent argued that the applicant had not established a basis for the granting of the orders sought. That since no award was read, and that in any event, the applicant has not followed the proper procedure for dealing with the matter now before court. That the applicant should either have filed judicial review proceedings or appealed to the Provincial Land Disputes Tribunal. Further, Mrs Ndorongo contented that none of the parties knows the contents of the award. The issue for determination of the court is whether the applicant has made out a case for the granting of the orders sought.

I have carefully considered the proceedings and submissions by learned counsel for both parties. I have also considered the provisions of the law under which the application has been made and in my humble view, the applicant has not persuaded me that he is entitled to the orders sought. First of all, although the applicant filed the application under Order 44 of the CPR – REVIEW – what he has asked the court to do is to set aside the judgment of the court dated 3.7.2003. It is also clear that the applicant did not annex to the application a copy of the order/judgment sought to be set aside, vacated and/or reviewed. Failure by the applicant to attach the order or decree intended to be reviewed is fatal to the applicant's case. I have also painstakingly perused the court file. There is nothing on record to show the content of the judgment referred to by the applicant. I have therefore no opportunity of examining the said judgment to know whether the same should be set aside, vacated and/or reviewed. There is also no indication by the applicant that he extracted the order nor that he has a copy of the judgment. How then can I be expected to pass judgment on the applicant's grievance in the matter. In the case of G.M. JIVANJI – V JIVANJI & ANOTHER (1929 – 30) 12 KLR 44, which case was followed by Onyancha J in **Mombasa HCCC No. 147 of 2001 – Diamond Trust Bank Ltd – Vs Jasper M'Nkanata M'Murithi,** the position regarding orders and/or decrees sought to be reviewed was stated as follows:-

"Each decree necessarily follows a judgment upon which it is grounded and if a person is aggrieved at the decree, his application should be for review of the judgment upon which it is based. But in my opinion, however aggrieved a person may be at the various expressions contained in a judgment as a whole, that person cannot under Order XLI (same as our present order 44) 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 …… It is the duty of a party who wishes to appeal against, or apply for review of a decree or order to move the court to draw up and issue the formal decree or order."

It would seem clear from the above decision, and I quite agree with the same, that it was mandatory for the applicant to extract the relevant decree and to attach a copy thereof to the application for review. I must express my great dissatisfaction with the manner in which this application was handled by counsel for the applicant. I also note that counsel for the respondent was not able to attack the application on the

ground that the applicant had failed to attach a copy of the decree to the application. Further, the applicant did not seem sure of whether he was praying for review or setting aside of the judgment. For these reasons, the applicant's application must fail.

I will also deal with the supplementary issue of whether or not the applicant followed the proper procedure in bringing the matter before court in the manner that he did. Sections 7 and 8 of the Land Disputes Tribunals Act (Act No. 18 of 1990) give the proper procedure to be followed by an aggrieved party to a lands dispute. The applicant did not follow the laid down procedure. There is no record of an appeal to the provincial appeals committee and to the High Court. At the same time, the Judicial Review procedure under Order 53 of the Civil Procedure Rules was also open to the applicant but apparently, either out of ignorance or indolence; the applicant did not take advantage of the same. On these ground too, the applicant's application must fail.

In the result, the applicant's application is dismissed in its entirety with costs to the respondent. Orders accordingly. Dated and delivered at Meru this 13th day of April 2005.

RUTH N. SITATI

Ag JUDGE

13.4.05