

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
MISC. CIVIL APPLICATION NUMBER 7 OF 1993

KIMUTAI RUTTO.....APPLICANT

VERSUS

CHEBUKTO ARAP MAIGARESPONDENT

RULING

The Applicant, Kimutai Arap Rutto has made an application under the provisions of order **XLIV Rule 1, order XXI Rule 22 of the Civil Procedure Rules and section 3A of the Civil Procedure Act** praying for orders of this court to review and set aside its orders granted the 27th of February, 2002. The grounds in support of the Application have been stated on the face of the application. The application is supported by the annexed affidavit of Raymond Kiprop Kipkemei, the Advocate for the Applicants. The Respondent Chebukto Arap Maiga did not file any pleading in opposition to the Applicant's application.

In his submission before court, Mr Kipkemei, Learned Counsel for the applicant submitted that the applicant was seeking to review and set aside the order issued by this court on the 27th of February, 2002. Learned Counsel submitted that a consent order was recorded by the parties before Mr. Justice Rimita. It was the Learned Counsel's submission that there was no substantive dispute pending before the said court which could have given the parties authority to enter into the said consent order. The Applicant submitted that an award made by the Panel of Elders was adopted by the Senior Resident Magistrate Kericho in Kericho **SRM Miscellaneous Application number 19 of 1991**.

The Applicant submitted that the matter was therefore Res judicata. The Applicant submitted that there was an error apparent on the face of the record which ought to be reviewed and set aside. The Applicant further submitted that the consent order entered on the 2nd of November, 1999 was irregular as the application then pending before the court was for enlargement of time to file Appeal out of time. The Applicant argued that the consent order entered was not in respect of the matter then directly in issue. The Applicant submitted that the said order went contrary to the orders of the court which were then in existence. Counsel further submitted that the Applicant's Advocates on record did not have authority to enter into the said consent. Mr. Mutai, Learned Counsel for the Respondent did not have any submission to make in response to the Applicants application.

I have read the application filed by the Applicant herein. I have also considered the submission made on his behalf by his counsel. The Applicant is seeking the orders of this court to review its orders of the 27th of February, 2002 which the Applicant alleges that were erroneously issued. The grounds in support of the application stated on the face of the application gives a date of the order sought to be reviewed which is at variance with the order that the Applicant is seeking in his application. In the said grounds, the applicant states that the order that he is seeking to review is the order of this Court issued on the 2nd of November, 1995 by the consent of the parties. I have perused the proceeding of this court. No orders were issued by this court on the 27th of February, 2002 as no proceedings took place on that date. On the 2nd of November, 1995 the parties herein entered into a consent whereby it was agreed that the dispute between the parties be referred to the Land Disputes Tribunal, Bomet. Presumably this is the order that the Applicant is seeking to have reviewed. Unfortunately, this court will not make a ruling based on presumptions. The Applicant was required to state clearly and concisely the order that he was seeking to have reviewed. In the instant case the Applicant wants to review a non-existent order. The Applicant's application, in my considered view, has no basis in law. This court cannot review an order which was not issued in the first place. In the premises therefore the Applicant's Application lacks merit.

This court wishes to point out that as a matter of good practice, a party making an application for review is required to extract the decree or the order that he is seeking to have reviewed and have it annexed to the application. Several decisions have been made by various courts of concurrent jurisdiction to this court on this point. The reason for this requirement is so that there is clarity, both on the part of the parties to the Application and on the part of the court, on what order or decree is sought to be impeached on reviewed. In the instant application, had the Applicant followed this recommended practice and extracted the order that he sought to have reviewed, he would not have fallen in the error that has made his application to be fatally defective.

For the foregoing reasons, the Application is dismissed with costs to the Respondent.

DATED at KERICHO this 29th day of October 2004

L. KIMARU

AG JUDGE