



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW CAUSE NO.20 OF 2011**

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO.24 OF 2009**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN**

**APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE PROCEEDINGS DECISION AND AWARD OF LIKUYANI LAND DISPUTES**

**TRIBUNAL AND THE SENIOR RESIDENT MAGISTRATE’S COURT AT BUTALI**

*(Being an application for certiorari and prohibition in Butali Senior*

*Resident Magistrates’s Court Cause No.26 of 2010)*

**BETWEEN**

**REPUBLIC..... APPLICANT**

**AND**

**MUYESU AMA..... INTERESTED PARTY**

**AND**

**EDWARD ELLY MUNUBI..... EX-PARTE APPLICANT**

**RULING**

1. The interested party/applicant approached this court via a notice of motion dated the 16<sup>th</sup> of June 2021 seeking *inter-alia* the following orders; -

a. That pending the hearing and determination of the application interpartes the honorable court be pleased to review its orders of 15.06.2021 directing listing down the Ex-parte Applicant preliminary Objection dated 16.12.2019 for ruling on 15.07.2021 and grant the interested party leave to file supplementary affidavit.

b. That the Court be pleased to arrest its ruling in the current cause slated for 15.07.2021 pending the hearing and determination of the application interpartes.

2. The application is based on the annexed affidavit of one Joseph Wabomba Wasike who deponed that the court made an order on the 15<sup>th</sup> of June 2021 listing down the ex-parte/applicant preliminary objection dated the 16<sup>th</sup> of December 2019 for ruling on the 15<sup>th</sup> of July 2021.

Further, Mr. Wasike deponed that there was an error apparent on the face of the record and that there has been discovery of new and important matter and/or affidavit that was brought to the attention of court in that the order of 15.06.2021 was made on account of some mistake or an error apparent on the face of the court's record.

3. In his annexed affidavit sworn in Kakamega on the 12<sup>th</sup> of June 2021, Mr. Wasike depones that he has never been instructed by the 2<sup>nd</sup> respondent (the interested party herein) to act for him in this matter. Mr. Wasike thus deponed that the Notice of Appointment dated the 5<sup>th</sup> of January 2021 purporting to show that he had been instructed by the interested party herein and bearing his signature, remains unknown to him.

4. The application is supported by the affidavit of the interested party herein Mr. Abdalla Amakanga sworn on the 16<sup>th</sup> of June 2021 wherein he deponed that he seeks to have orders made by court set aside on grounds that he was never notified about the matter and the firm of J.I Khayumbi & Co. Advocates who purportedly represented him had no instructions from the interested party to represent him whatsoever.

5. Further, the interested party deponed that in response to his application dated the 29<sup>th</sup> of November 2019, the ex-parte applicant filed a replying affidavit and notice of preliminary objection dated the 16<sup>th</sup> of December 2019 raising issues that the firm of Mukabane & Kagunza are not properly on record pursuant to Order 9 Rule 9 of the Civil Procedure Rules. The court gave direction that the P.O be heard first and the same be canvassed by way of written submissions.

6. It is further deponed by the interested party that he visited the firm of J.I Khayumbi in Kakamega to inquire how he was represented without his knowledge only for him to learn that the Notice of Appointment by J.I Khayumbi was a forgery and the said J.I Khayumbi swore an affidavit denying the signature contained in the said Notice of Appointment.

7. The interested party thus deponed that the court order made on the 15.06.2021 listing down the ex-parte applicant P.O dated the 16<sup>th</sup> of December 2019 for ruling on the 15<sup>th</sup> of July 2021 was made on account of some mistake or an error apparent on the face of the record of court and thus seeks to have the same set aside and the court be pleased to grant the interested party the orders sought.

8. When the matter came up for mention on the 13<sup>th</sup> of July 2021, Mr.Kagunza for the interested party/applicant informed court that the application had been served (affidavit of service duly filed) and remains unopposed.

#### **Analysis & Determination**

9. The only issue for determination is whether the applicant has met the threshold for grant of the orders sought.

10. Considering that the application has been brought pursuant to *Order 45 rule 1 & 2* and *Order 51 rule 1* of the *Civil Procedure Rules* and *Sections 63(e) and 80* of the *Civil Procedure Act*, it is instructive to note that the above provisions concern review of court order/judgment.

11. Both *Section 80 of the Civil Procedure Act and Order 45 of the Rules* grant courts the power of review. However, this power must be exercised within the framework of *Section 80 of the Civil Procedure Act and Order 45 Rule 1* of the *Civil Procedure Rules*.

12. In particular, *Section 80* of the *Civil Procedure Act* 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

13. On the other hand, *Order 45 Rule 1* of the *Civil Procedure Rules, 2010* provides: -

***45 Rule 1 (1) Any person considering himself aggrieved-***

***(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."***

14. A reading of the above provisions shows that whereas *Section 80* gives the power of review, *Order 45* sets out the rules and grounds upon which a court exercises the power of review. The rules stipulated under *Order 45*, restrict the grounds for review and further lay down the scope and jurisdiction of review.

15. Accordingly, Order 45 limits review to the following grounds-

*(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*

*(b) on account of some mistake or error apparent on the face of the record, or*

*(c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.*

16. In Tokesi Mambili and others vs Simion Litsanga [2004] eKLR the court held that: -

*i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.*

*ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

17. In the instant case, the applicant alleges that there is discovery of new and important matter and that is that the order made on the 15 of June 2021 was made on account of some mistake or an error apparent on the face of the court record. In particular, the applicant deponed that he was unrepresented as he had not provided instructions to the firm of J.I Khayambi who appeared on his behalf. In fact, the applicant has annexed an affidavit of the said Jackson Khayambi sworn on the 12<sup>th</sup> of June 2021 wherein the said Advocate depones that the notice of appointment indicating him as the advocate for the applicant is a forgery and the signatures contained therein is unknown to him. In the affidavit, Mr. Jackson Khayambi deponed further that he has never been instructed by the applicant herein to act for him in this matter.

18. I take cognizance of the fact that Order 9 rule 1 requires that only a duly appointed advocate can represent a party before court. In particular, Order 9 rule 1 provides;

***“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf”***

19. The corollary to this provision is that an advocate not duly authorized cannot act for a party. After all, it is trite law that only a duly appointed and authorized advocate can act for a party. Consequently, where an advocate has no instructions from a client to act for them and proceeds to act for that client, then the resultant effect would be that any orders or proceedings emanating from such ‘representation’ is null and void.

20. In the instant case, there is allegations that the notice of appointment was a forgery and the signatures therein are disputed by the firm that allegedly represented the interested party herein. The claim by the firm of J.I Khayumbi particularly as contained in the affidavit of Jackson Khayumbi raises potential criminal issues bordering on forgery and perjury that need be investigated.

21. In the circumstances and in the interest of justice, I do stay the ruling meant for today in Judicial Review No. 20/2011, and do direct that the alleged issues of forgery in this matter be investigated by the police.

22. The outcome of the said investigations be filed by the police within a period of 60 days, in this file.

Mention on 2<sup>nd</sup> November, 2021.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF JULY, 2021**

In the presence of:-

Mr. Kagunza for the Petitioner

Mr. Angu Kitigin for the respondent.

Ms Gladys – Court Assistant