REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC CIVIL APPLICATION NO. 8 OF 2012

IN THE MATTER OF AN APPLICATION BY STEPHEN MURIITHI NJERU

AND JAMES KAMARU MATHENGE FOR LEAVE TO APPLY FOR AN

ORDER OF CERTORARI, PROHIBITIONS AND MANDAMUS

IN THE MATTER OF LAND PARCEL NO. BARAGWI/RAIMU/2281 2305

REPUBLIC.....APPLICANT

VERSUS

KIRINYAGA COUNTY COUNCIL.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE

AT KERUGOYA.....2ND RESPONDENT

AND

STEPHEN MURIITHI NJERU.....(EXPARTE) INTERESTED

JAMES KAMARU MATHENGE.....(EXPARTE) PARTIES

RULING

What is before me is the Notice of Motion dated 1st April 2019 brought under ***Order 45 Rule 1 (a) & 2, Order 51 Rule 1 CPR, Section 1A & 1B CPA***. The applicant is seeking the following orders:

> ***(1) That the Honourable Court be pleased to review the orders awarding costs to the 1st respondent and set aside such orders.***
>
> ***(2) That the Honourable Court upon considering prayer (1) above be pleased to order that parties bear their own costs.***
>
> ***(3) That costs of this application be provided for.***

The application is supported by an affidavit sworn by the 1st interested party and grounds sworn on the face of that application. The 1st respondent filed grounds of opposition in response to that application.

APPLICANT'S CASE

The applicant in his affidavit in support of his application has given a long narrative how they first instituted HCCC No. 265 of 1997 (Nyeri) through their representatives over land parcel No. BARAGWI/RAIMU/38. He stated that the suit proceeded to full hearing before Justice V. Juma who gave judgment in their favour. The applicants further stated that the respondents were aggrieved by the findings of the Court and moved to the Court of Appeal where their Appeal was dismissed in C.A. No. 242 of 2000 (NBI). The applicants further stated that the appellants through other parties moved to the lower Court and filed PMCC No. 145 of 2012 (Kerugoya) claiming ownership of L.R. No. BARAGWI/RAIMU/38. The case proceeded before Hon. K.K. Cheruiyot, Senior Resident Magistrate who reversed the decision of the two superior Courts. Pursuant to the decree of the lower Court, all title deeds and dealings in L.R. No. BARAGWI/RAIMU/38 stood cancelled as opposed to what the superior Court had ordered. He stated that the interested parties then filed a Judicial Review No. 8 of 2012 challenging

the decision of the subordinate Court. During the pendency of the Judicial Review proceedings, the subordinate Court reviewed its orders made on 23rd May 2012. The interested parties were condemned to pay costs of the Judicial Review proceedings which was occasioned by the mistake committed in the lower Court by parties other than the interested parties.

1ST RESPONDENT'S CASE

The 1st respondent through the firm of Maina Kagio raised five grounds in opposition to the application. He stated that an award of costs is in the discretion of the Court under ***Section 27 (1) of the Civil Procedure Act.*** He stated that nowhere has it been stated that the Court acted irrationally, illegally or that there was an error apparent on the face of the record to warrant review of the orders. He argued that as alluded in paragraph 10 of the applicant's supporting affidavit, the alleged correction of the orders was done on 23rd October 2012 yet the Judicial Review proceedings were filed on 20th December 2012. He stated that it is therefore untrue that the alleged orders of correcting the earlier orders of 23rd May 2012 were issued after the filing of the suit.

The learned counsel submitted that the 1st respondent was named as the 1st respondent in the Judicial Review proceedings and that he opposed the suit. He submitted that costs follow the event and that the 1st respondent is therefore entitled to costs.

DISPOSITION

I have considered the application and the supporting affidavit. I have also considered the rival submissions and the applicable law. The substantive orders being sought by the applicant is for review. Orders of review are founded under ***Section 80 and Order 45 of the Civil Procedure Act*** and the rules made thereunder. ***Order 45 CPR*** reads as follows:

> ***45 (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 a review of judgment to the Court which passed the decree or made the order without unreasonable delay".***

From my plain reading of ***Section 80 CPA and Order 45 Rule 1 CPR,*** it is abundantly clear that before an order for review is allowed, an applicant must demonstrate beyond peradventure the following principles:

> ***(1) That there is a discovery of a new and important matter which was not within his knowledge at the time he was required to adduce the same despite the exercise of due diligence.***
>
> ***(2) That there is a mistake or error apparent on the face of the record or***
>
> ***(3) For any other sufficient reason (s).***

The first two principles are fairly straight forward and does not require rocket science to determine their existence or otherwise. As regards the third principle, the superior Courts have made a multitude of decisions on what constitutes sufficient cause. In the case of ***Parimal Vs Veena***, the Court attempted to define the word and observed as follows:

> ***"Sufficient cause" Is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough" in as much as may be necessary to answer the purpose intended. Therefore, the word 'sufficient' embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercised discretion, it has to be exercised judiciously".***

Though the applicant has invoked the provisions of ***Order 45 CPR,*** he has not shown that there is a discovery of new and important matter which was not within his knowledge or would not be produced when the decree was passed. The applicant has not also demonstrated any mistake or error apparent on the face of record or any other sufficient cause to warrant this Court exercise its residual authority to re-open a concluded matter.

In the case of ***Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Ltd (2014) e K.L.R***, the Court of Appeal observed thus:

> ***"(57) Jurisdiction that emerges shows that notwithstanding that it (the Court) has not explicitly been statutorily conferred with the jurisdiction to re-open a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to (sic) correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is***

pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown, in the various authorities, this is jurisdiction that should be invoked with circumspection.

61…This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice".

I also wish to state that this application is seeking to review an order on costs. It is trite law that an award of costs is at the discretion of the trial Court making such an award for which an order for review is not available. Where a party is aggrieved by an award of costs, is remedy is an appeal but not by way of review. In that regard, I am guided by the decision in the case of ***Re Ebuneiri Waisswa Kafuko (2001) 2 E.A 383*** where the Court in Uganda held as follows:

"The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the Judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the Judge's discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs".

My parting shot is that the application dated 1st April 2019 lack merit, frivolous and an abuse of the Court process. The same is hereby dismissed with costs.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 4TH DAY OF OCTOBER, 2019.

E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019

In the presence of:

1. Mr. Otieno

2. Ms Wambui holding brief for Maina Kagio

3. Wachira – Court clerk