REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NO. 165 OF 2012

TERESIA WANGUI THUITA.....APPLICANT

-VERSUS-

IGNATIUS MAINA NDURU.....RESPONDENT

(Being an appeal on points of law from the award of Nyeri Provincial

Land Dispute Committee made on 27th May 2009 in Land

Appeal Case No. Nyandarua North 2 of 2009)

RULING

1. The background to these proceedings is well captured in the Judgment dated 22nd May 2012 (W. Ouko J, as he then was). It involved a boundary dispute between land Parcel No.310 (subdivided into No. 3155, 3156 and 3157), the property of the Applicant Teresia Wangui Thuita and land Parcel No.282 owned by Igantius Miana Nduru – who was the Appellant in HCA No. 163 of 2009 and the Respondent hereof.

2. In his judgment referred to above, the Learned Judge in effect upheld the Award of Nyeri Provincial Land Disputes Appeal Committee in Land Appeal Case No. Nyandarua No.2 of 2009 dated 27th May 2009. It is this Judgment, by the application dated 6th June 2012 I am urged to order a stay of execution pending the hearing, and also review the order/decree dated 22nd May 2012 in the HCA No. 163 of 2009.

3. The application is grounded on **Order 51 and 42 Rule 24 of Civil Procedure Rules and Section 3A of the Act.** I am urged to not only review the judgment/decree but also give directions on the award on re-admission and re-hearing of the appeal afresh as the dispute is said not to have been resolved.

It is stated that the omission to give directions on the award amounts to an error on the face of the record this falling under the provisions of **Order 42 of Civil Procedure Rules.** It is further stated that if the award by the District Land Dispute Tribunal is adopted and executed, it will prejudice the applicant.

4. There is no doubt that the applicant seeks an order of Review of the judgment dated 22nd May 2012. It is seriously opposed by a Replying Affidavit sworn by the Respondent on the 11th July 2012. The main basis for opposition is that this court's jurisdiction on review is incompetent.

Applications for Review are grounded on Order 45 of Civil Procedure Rules and not Order 42.

5. A reading of **Order 45 of Civil Procedure Rules** envisages that an order for Review ought to be made in the same suit where the court is able to consider the proceedings so as to discern whether or not an error on the face of the record is evident – and apparent. The application too ought to be brought without unreasonable delay – rule 1.

6. The application was filed on the 6th June 2012 less than a month after the judgment. That was within a reasonable period. It is not clear why the applicant did not prosecute the application timetiously and only approached the court after five years. That as it may, I have considered arguments and counsel oral submissions. An application for Review ordinarily ought to be filed within the suit where the judgment or order sought to be reviewed was made. I have stated earlier at paragraph **5 above** that only in such case would the court be able to consider the basis for the order sought. I do not think providing court with a copy of the judgment alone would be sufficient.

Order 45 Rule 1 is quite clear that such application ought to be in the suit where the order or judgment are found, and not in separate proceedings.

7. The court's appellate jurisdiction in which **Ouko, J** was sitting cannot be challenged in separate proceedings. I have also seen the allegations against the Judge, that he failed to give directions in regard to the award, that he failed to order fresh hearing of the appeal and therefore an apparent error was committed. Even assuming that this application was admitted for hearing in this Miscellaneous Application, the applicant is mandated, under **Order 45 of Civil Procedure Rules** to demonstrate that the error or omission is plain, and evident and should not require elaborate argument to be established – **National Bank** o**f Kenya Ltd -vs- Ndungu Njau (1997) e KLR.**

8. Further, it is trite that an order of Review cannot be sought for merely to order a fresh hearing or arguments or correction of an erroneous view taken earlier by a Judge. What is permissible is only for correction of a patent error of law or fact which stares in the face without elaborate arguments – **Stephen Gathua Kimani -vs-Nancy Wanjira t/a Providence Auctioneers (2016) e KLR.** This can only be seen in the proceedings from which the erroneous omission or commission were made.

To ask the court to order a retrial or a fresh hearing is by implication asking the court to sit on appeal, and make such findings that would necessitate an order for fresh hearing. This court cannot attempt to sit on appeal from a Judgment of a Judge of concurrent jurisdiction.

9. I therefore find no merit whatsoever in the applicant's application. The applicant if aggrieved by the judgment dated 22nd May 2012 in HCA No. 163 of 2009, he should approach the court for further relief through the correct procedure which his advocate would ably advice.

The application dated 6th June 2012 is incompetent and is therefore dismissed with costs.

Dated, signed and delivered this 7th Day of June 2018.

J.N.MULWA

JUDGE