



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT MISC CIVIL APP. NO. 13 OF 2006

**IN THE MATTER OF APPLICATION BY FRANCIS OMWENGA OBONYO FOR JUDICIAL
REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF MARANI LAND DISPUTE TRIBUNAL

BETWEEN

REPUBLIC APPLICANT

VERSUS

MARANI LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT 2ND RESPONDENT

RICHARD MAKORI NYAKUNDI 3RD RESPONDENT

AND

FRANCIS OMWENGA OBONYO EX-PARTE APPLICANT

RULING

1. **Hon. Justice Muchelule** by a ruling delivered on 1st February 2010 allowed the application by the ex parte applicant for an order of certiorari to quash the decision of Marani Land Disputes Tribunal dated 8th February 2005 awarding the 3rd respondent land parcel number **W/K/Bokingoina/1559** and awarded costs of the application to the ex parte applicant. Costs in favour of the ex parte applicant were on 29th March 2012 taxed at kshs. 198,666/= . The ex parte applicant has taken out execution proceedings by way of notice to show cause against the 3rd respondent why execution should not issue for the recovery of the taxed costs. The notice to show costs is pending hearing before the deputy registrar.

2. The 3rd respondent by a Notice of Motion dated 5th June 2015 expressed to be brought under Order 45 Rule 1 and 2 of the Civil Procedure Rules and sections 1A, 1B, 3, 3B and 63 (e) of the Civil Procedure Act prays inter alia for the following orders:

1. **That there is a stay of execution of the notice of show cause against the applicant for payment.**
2. **That the court be pleased to review the judgment and/or decree of the court herein delivered on the 1st day of February 2009 and more specifically the order of awarding costs.**
3. **That the court be pleased to make a finding that the applicant's freedom is on the verge of being infringed.**
4. **That costs be in the cause.**

3. The applicant's application is premised on the grounds set out on the face of the application and the supporting affidavit sworn by the applicant on 5th June 2015. The applicant's position as per the grounds in support and the supporting affidavit appears to be that he has no means to pay the adjudged costs and he should therefore not be committed to civil jail on account of his inability to pay. The ex parte applicant filed grounds of opposition and a Notice of Preliminary Objection both dated 1st October 2015 but which are in all respects duplicated. In the grounds of opposition the respondent states that:-

1. **The application is incompetent and bad in law.**
2. **There has been inordinate delay in bringing the application.**
3. **The application is an abuse of the court process.**
4. **The application has no merit.**

4. The parties have filed written submissions to ventilate their respective standpoints. The applicant filed his submissions on 30th October 2015. The applicant in the submissions reiterates that he is not a person of means and is not able to pay the assessed costs and cites article 2 (6) of the Constitution which imports International Treaties and Conventions that have been ratified by Kenya and makes them part of the Law of Kenya and in that regard refers to Article 11 of the International Convention for Civil and Political Rights which provides that **"No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation"** to support his submissions.

5. The ex parte applicant's submissions dated 19th October 2015 were filed on the same date. The ex parte applicant's submissions outline the facts relating to the matter culminating with the applicant's instant application. The respondent reiterates the application is incompetent and bad in law and argues that an order made pursuant to Order 53 of the Civil Procedure Rules is not amenable to review under the provisions of Order 45 as Order 53 has its own special procedure. I have looked at Order 53 governing applications for certiorari and there is no express provision excluding the application of Order 45 of the Civil Procedure Rules respecting review of orders/decrees issued under Order 53. Order 45 Rule 1 applies to all decrees or orders without exception.

Order 45 Rule (1) provides thus:-

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.

6. Under Order 43 (1) (aa) appeals lie as of right from orders/rulings made under Order 53 (judicial review orders) and therefore Order 45 ought to be applicable to orders made under Order 53. For an applicant for review to **succeed** in an application for review under Order 45 such an applicant must show or demonstrate that:-
 - i. **There has been discovery of new and important matter or evidence that was unavailable at the time the order sought to be reviewed was made; or**
 - ii. **There was some mistake or error apparent on the face of the record; or**
 - iii. **There is other sufficient reason; and**
 - iv. **The application for review has been made without unreasonable delay.**

7. I have carefully reviewed the applicant's application and in my view the applicant falls far short of establishing any of the grounds under Order 45 upon which a decree or order could be reviewed. There is definitely no discovery of any new and important/matter; there is no demonstrable mistake or error apparent on the face of the record and in my view there is no other sufficient reason that has been shown. The reference by the applicant to article 2 (6) of the Constitution and to the provisions of the International Convention for Civil and Political Rights cannot come to the aid of the applicant. In interpreting the Constitution the court is guided by the provisions of Article 259 (1) of the Constitution which provide that the constitution shall be interpreted in a manner that
 - a. **Promotes its purposes, values and principles;**
 - b. **Advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;**
 - c. **Permits the development of the law; and**
 - d. **Contributes to good governance.**

8. In the instant matter, the applicant initiated the process before the Land Disputes Tribunal that led to the flawed award to the applicant which the court quashed by its decision of 1st February 2010. The costs are awarded at the discretion of the court and the court awarded the ex parte applicant the costs of the judicial review application. The applicant did not appeal the decision of the court and quite clearly the instant application for review must be an afterthought and has been brought hopelessly out of time. From the court record the applicant has been participating in proceedings relating to the process of execution of the resultant order of the court of 1st February 2010 at least from 2012 when he engaged counsel. He has been aware of the order and yet took no action to seek a review until the Deputy Registrar directed on 18th May 2015 that the Notice to Show Cause for recovery of costs proceed for hearing on 8th June 2015. The law provides for all the processes that the ex parte applicant has undertaken to safeguard his interest and rights under the law. The rule of law is all about applying the law impartially and without favour and that is what this court must do

9. While the ex parte applicant may not properly seek the eviction of the applicant in these proceedings, I find no basis whatsoever to stay execution by the ex parte applicant for the costs awarded to him. The notice to show cause is not a matter before this court but is before the Deputy Registrar who is properly seized with the matter. It is before the Deputy Registrar that the applicant can show cause, if any, and why execution should not issue against him in the manner proposed by the ex parte applicant decree/holder. The court on 1st February 2010 did not order the eviction of the applicant and could not have done so because the matter before it only related to a certiorari application to quash the decision of the Land Disputes Tribunal and no more.

10. The upshot is that I find and hold the Notice of Motion dated 5th June 2015 to be devoid of any merit and I order the same dismissed with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 4th day of December, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the 3rd respondent/applicant

..... for the 1st and 2nd respondents

..... for the ex parte applicant/respondent

J. M MUTUNGI

JUDGE