



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL APPEAL NO.84 OF 2009

FRANCIS NJOGU MURIMIAPPELLANT

NYAKIO MURIMI (Deceased)

VERSUS

NGIGI KIRIIRA.....RESPONDENT

R U L I N G

On the 27th October 2011, Hon Mr Justice J.K. Sergon dismissed the appeal herein being an appeal from the award of the Kikuyu Land Disputes Tribunal delivered on 8/6/2005 pursuant to Section 9 of the Land Dispute Act No.18 of 1990 and the award of the Central Land Disputes Appeals Committee at Nyeri dated 28/5/2009.

Hon. Justice Sergon found that the *Appeals' Committee* and the Land Disputes Tribunal had entertained a matter under their respective mandates as they were arbitrating on a matter related to trespass to land and determination of boundaries.

The appellant/applicant is not satisfied with the decision of the honourable court and seeks to review the judgment delivered on 27/10/2011 disallowing the appeal on grounds that he has found a new and important matter which was not within his knowledge and could not be produced by him by the time the decree was passed.

He states that the respondent filed grounds of opposition to the appeal dated 5/4/2011 and failed to serve appellant/respondent.

The applicant learnt about the document on 1/11/2011 when he perused the court file and felt disadvantaged during the hearing of the appeal.

The respondent has opposed the application on grounds that the application is defective for failure to include an order or decree which sought to be reviewed. The court has considered this ground and finds no merit in the same as the judgment of the court sought to be reviewed is on record. Moreover the court has a duty under Article 159 of the Constitution not to take undue regard to technicalities and believes that this is one of such technicalities. The court has an obligation to ensure that procedural technicalities such as failure to extract a decree from a judgment do not pre-empt a party from receiving ultimate justice.

The second ground is that the grounds for review as submitted to this court do not disclose any 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.

The appellant has filed this application on the basis of discovering a new and important matter which was not within his knowledge and could not be produced by him at the time of judgment being entered. I have perused the court file and do observe that the grounds of opposition to the appeal are on record having been filed on the 8/4/2011 and therefore they do not qualify as a new matter though the applicant claims that he was not served. I have perused the grounds of opposition and do find that they do not raise any new matter but basically they raise points of law that could have been canvassed even without their being on record.

I agree with the respondent's counsel that a matter already canvassed before the trial court does not become a subject to review where the court makes a finding on the same as the only available legal remedy is in the Court of Appeal. The appellant's available recourse is to appeal to the court of appeal as the High Court cannot review its own decision on merit but only on error apparent on face of record or on discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the applicant or could not be produced at that time.

Lastly, the discovery of the grounds of opposition is not likely to influence the outcome of the case as the decision of the judge was based on only points of law as allowed by Section 8(8) of the Land Disputes Tribunals Act No.18 of 1990. The court certified the points of law and determined them and therefore it became *functus officio*.

The learned Judge found that the Land Disputes Tribunal acted within its mandate under section 3 of the Land Disputes Tribunal Act No.18 of 1990. I do not see anything in the grounds of opposition that would assist the appellant to reverse the decision of Honourable Court on the issue of jurisdiction and the registered proprietor's guaranteed rights under Section 27 and 28 of the Registered Land Act (repealed).

The upshot of the above is that the application is dismissed with costs.

Dated, signed and delivered on 9th day of May 2014.

A. OMBWAYO

JUDGE