



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 9 OF 2015

ISAAC FULA SIAKA.....PETITIONER/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA

COUNTY DIRECTOR OF SURVEY

THE KENYA RURAL ROADS AUTHORITY....3RD RESPONDENT/APPLICANT

RULING

The application is dated 1st November 2018 and is brought under Section 80 of the Civil Procedure Act Cap 21 of the Laws of Kenya and Order 45, Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. This application be certified urgent and be heard ex parte in the first instance.
2. This honourable court be pleased to review, vary and/or set aside that part of its judgment and orders made herein on 18th September, 2018 and all consequential processes arising therefrom which held that the 3rd respondent/applicant constructed the alleged access road on the suit property title No. NORTH KABRAS/LWANDETI/1652 which violated the petitioner's rights as alleged in the petitioner's petition and ordered payment of costs of the petition to the petitioner by the 3rd respondent/applicant.
3. The execution of the judgment and orders made in the absence of the 3rd respondent/applicant on the 18th September, 2018 and all consequential processes arising therefrom be stayed, suspended and/or lifted pending the hearing and determination of this application.
4. Pursuant to order 45 Rule 5 of the civil Procedure rules this honourable court be pleased to re-hear the petition herein and/or make such orders as to the re-hearing of the petition as the honourable court deems fit and just.
5. Costs of this application be provided for.

The applicant submitted that said findings of the court constitute apparent errors on the face of the judgment since, despite the fact that the Authority did not file responses or participate in the hearing the judgment suggests that, the authority made submissions conceding to the petitioner's ownership of the suit land. The authority filed a response and or made oral submissions admitting that it had affected the petitioner's land by constructing the alleged access road. The Authority submitted a valuation report whereas the Authority had not submitted any such valuation report to the court. The Authority had a duty to acquire the petitioner's land when on the contrary the road in question does not fall under the Authority's mandate. The Authority has mandate over the access road purportedly constructed across the suit land. As a result of the foregoing findings of the honourable court, which contains apparent errors, the court held that there was breach of the petitioner's rights as alleged in the petition which purported breach has been committed by the 3rd respondent/applicant herein. Furthermore, flowing from the foregoing errors apparent on the face of the judgment, the 3rd respondent/applicant has been ordered to pay costs of the petition to the petitioner despite the petitioner failing to demonstrate the 3rd respondent/applicant's culpability in the alleged breaches. The honourable court's findings as against the 3rd respondent/applicant further ought to be reviewed and/or set aside for the reasons that, the said erroneous and adverse findings against the 3rd respondent/applicant are also made despite the obvious admission by the petitioner that he (the petitioner) "wrote a protest note to the 1st respondent and despite receipt of the said letter, the 1st respondent went on with the illegal construction of an access road on the petitioner's title hence violating his rights of not heard among others". The erroneous and adverse findings against the 3rd respondent/applicant on violation of the petitioner's rights through construction of the alleged access road has also been made despite the honourable court finding that the petitioner "wrote a protest note addressed to the office of the 1st respondent and despite receipt of the said letter, the 1st respondent went on with the illegal construction of an access road on the petitioner's title hence

violating his rights of not being heard among others” and that “when the petitioner failed to get a hearing from the 1st respondent and the excise of his title went on, the petitioner petitioned the area assistant chief who vide his letter dated 6th June, 2014 wrote to the Ministry of Agriculture to access the damage occasioned to his crops on the suit title.” The honourable court failed to take judicial notice of the fact that the purported access road does not fall under the mandate of the 3rd respondent/applicant but rather falls under the mandate of the relevant county government pursuant to section 5 (a) under part 2 of the fourth schedule to the Constitution of Kenya, 2010. The honourable court failed to take judicial notice of failure by the petitioner to comply with the mandatory requirements of section 67 (a) of the Kenya roads Act prior to instituting the purported petition herein as against the 3rd respondent/applicant. The 3rd respondent/applicant avers that the foregoing reasons constitute “sufficient reasons” for which the judgment herein ought to be reviewed in the manner sought by the 3rd respondent/applicant. The 3rd respondent/applicant had no notice of the judgment date issued by the court and only learned that judgment on the subject petition had since been delivered on 18th September, 2018 when the petitioner served the 3rd respondent/applicant with a purported bill of costs dated 26th September, 2018. The petitioner has now commenced the process of taxing the bill of costs of the petition and the 3rd respondent/applicant risks being compelled to pay costs arising from purported breach of the petitioner’s rights which the 3rd respondent/applicant is not privy to unless the honourable court intervenes as sought herein.

The petitioner has opposed the 3rd respondent’s application dated 1/11/2018 pursuant to the statement of grounds of opposition dated 6/12/2018. It is the petitioner’s submission that the 3rd respondent is guilty of the following that despite service of the petition herein upon the 3rd respondent, they chose not to file any response to the same. That it is clear from the record that the 3rd respondent is always served with hearing notices including the notice for taxation of costs, but they chose not to act. That the 3rd respondent have not annexed any draft defence to their application and thus the honourable court cannot act in a vacuum. That the 3rd respondent’s application is filed inordinately late bearing in mind that the 3rd respondent was always notified of what transpired in court. That no sufficient material has been placed before the honourable court to warrant issuance of the orders sought. In the case of National Bank of Kenya Limited vs. Ndungu Njau 1997 e KLR

Holding at page 4 paragraphs 3 and 4

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view that the court proceeded on an incorrect position of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of the law cannot be a ground of review.

In the instant case they submit, the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and conclusion of the law, it could be a good ground for appeal but not for review, otherwise they agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

This court has carefully considered the application and the submissions therein. The application is made on the grounds that the petitioner herein filed the subject petition on 4th May, 2015 before the High court of Kenya at Kakamega despite the subject matter falling within the exclusive jurisdiction of the Environment and Land Court. The subject petition was however heard and determined by the Environment and Land Court (the Hon. Lady Justice N.A. Matheka) and judgment thereon delivered on 18th September, 2018. Following the filing of the petition the Authority embarked on the process of competitively procuring legal services whom the Authority could instruct to represent it on this court case which is a mandatory requirement under the Public Procurement and Asset disposal Act, 2015. In light of the lengthy procurement process which run until mid 2018 the authority had not filed any document nor did it participate in the proceedings of the subject petition before this honourable court and only learned that a judgment had been delivered when the petitioner herein served upon the authority a purported Bill of Costs. Annexed hereto and marked PMP-001 is a copy of the Bill of costs served upon the Authority. The authority has since established that a judgment on the subject petition was indeed entered on 18th September, 2018 and obtained an electronic copy of the said judgment. Upon reading the judgment herein the Authority noted that the judgment had errors apparent on its face in that the judgment erroneously states that, the respondents submitted that, it is not in contention that the petitioner is the registered owner of Land parcel No. N. Kabras/Lwandeti/1652. The respondents admit affecting the petitioner’s land by constructing an access road to the extent of 0.2 acres as per the respondents’ valuation report which is herein annexed to the respondents’ submissions and the value thereof assessed at Kenya shillings Two hundred and Thirty thousand (Ksh. 230,000/=) only. The respondents have in no way endeavoured to acquire the petitioner’s land by having it forcefully transferred into their name. I have perused the court file and find that a notice of appointment was filed in court by Ms Phoebe Munihi Muleshe & Co for the 2nd and 3rd Respondents and the same is dated 18th July 2018. The applicant in this application is the 3rd Respondent in the petition and who is the Kenya Rural Roads Board. Going by this document the parties agreed to file written submissions in this Petition and indeed Muleshe Advocate filed the submissions on behalf of the Respondents on the 18th July 2018. Indeed on the 18th June 2018 Muleshe Advocate for the Respondents and Opiyo Advocate for the Petitioner adjourned the matter with a view to pursue an out of court settlement. Come 17th July 2018 Muleshe Advocate appeared in court for all the Respondents. I see no error apparent on the face of the record and the submissions filed by Muleshe Advocate were taken as those of all the Respondents. The record speaks for itself and the applicant is free to peruse the court file. I find no erroneous statements in my judgement. The applicant is advised to sort out the issue of representation with the advocates on record as it would appear that Prof. Mumma & Company Advocate is not properly on record. I find this application is not merited and I dismiss the same with costs.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF APRIL 2019.

N.A. MATHEKA

JUDGE