



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**JUDICIAL REVIEW APPLICATION NO. 23 OF 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**CHAIRMAN BURE'TI**

**LAND DISPUTES TRIBUNAL .....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL**

**MAGISTRATES COURT, SOTIK.....2<sup>ND</sup> RESPONDENT**

**AND**

**LUDIA MATUI.....1<sup>ST</sup> INTERESTED PARTY**

**WILSON LANGAT.....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE**

**PHILIP KIRUI KORIR.....1<sup>ST</sup> SUBJECT**

**DAVID LANGAT BARCHOK.....2<sup>ND</sup> SUBJECT**

**RULING**

**Introduction**

1. The Applicants herein filed an application dated 14<sup>th</sup> March 2019 seeking orders of stay of execution and review or setting aside of the order of this honourable court's Orders dated 30.1.2018. The said application is premised on the affidavit of Wilson Langat sworn on his own behalf and on behalf of the 1<sup>st</sup> Interested Party. In the said affidavit, he depones that they were never served with the Notice of Motion for Judicial Review and they only learnt of this suit when the Respondents sent Hegeons Auctioneers to attach their property as per the proclamation dated 2.3.2019. He further depones that the Applicants' response to the application for Judicial review raises triable issues and they ought to be given an opportunity to be heard.

2. The application was opposed by the respondents through the affidavit of Philip Kirui Korir sworn on the 29<sup>th</sup> March 2019 in which he depones that the applicants were duly served with the application and the notice of taxation.

3. The application was canvassed by way of written submissions and both parties filed their submissions.

**Issue for determination**

4. The main issue for determination is whether the court ought to set aside the ex-parte orders issued on 30.1.2018.

**Analysis and Determination**

5. It is the submission of learned counsel for the Applicants that lack of service is sufficient ground for setting aside and or review of the

court's orders. He has cited the cases of **Esther Wamaitha Njihia & 2 Others v Safaricom Ltd** and **Shah v Mbogo** for the proposition that the court has an unfettered discretion to set aside a judgment. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who sought, whether by evasion or otherwise to obstruct or delay the cause of justice.

6. Counsel has also submitted that the applicants case has merit as it is their contention that the Bureti Land Disputes Tribunal merely adopted the decision of the Kericho Land Registrar on the boundary dispute between the applicants and the respondents and the Tribunal therefore acted within its jurisdiction.

7. On the other hand, learned counsel for the Respondents has submitted that the application lack merit. It is her submission that the applicants have not met the threshold for review as there is no mention of any new evidence or error apparent on the face of the record. She has cited the case of **Stephen Githua Kimani v Nancy Wanjira Wariungi T/A Providence Auctioneers (2016) eKLR**.

8. The exercise of Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal and orders issued with finality in the exercise of the said jurisdiction namely, mandamus, prohibition or certiorari are not amenable to recall, review or setting aside. This was so held in the case of **Amritlal Shah and Another v Republic & 3 Others (2013) eKLR**. However, a default order granted in the exercise of Judicial Review jurisdiction is not a final order in terms of section 8 (3) as read with section 8 (5) of the Law Reform Act and is therefore amenable to review or setting aside by the issuing court. This was so held by the Court of Appeal in the case of **John Macharia Gichingi v Commissioner of Police (2017) eKLR**.

9. In the instant case, even though the applicants have prayed for review or setting aside, the supporting affidavit and submissions mainly relate to the prayer for setting aside. I have considered the rival affidavits and submissions and applying the principles of setting aside an ex-parte judgment set out in the case of **Shah v Mbogo** (*supra*) to the facts of this case, I am of the view that this application has merit and I grant it.

10. Consequently, the orders issued on 30.1.2018 together with all consequential orders thereto are hereby set aside. The applicants shall file their Replying Affidavit within 21 days from the date of this Ruling so that the substantive application for Judicial Review can be heard on its merits.

11. The costs of this application shall be in the cause.

**Dated, signed and delivered at Kericho this 13<sup>th</sup> day of June, 2019.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss Cheruiyot for Mr. Koko for the Applicant
2. Miss Sitati for the Respondent
3. Court Assistant – Rotich