



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 9 OF 2018

JOEL MADAHANA.....APPLICANT

VERSUS

DIRECTOR OF FOREST SERVICES.....RESPONDENT

RULING

1. BACKGROUND

(a) **Joel Madahana**, Applicant, commenced these proceedings through the Motion dated and filed on the 17th April, 2018 seeking for an order allowing him to transport charcoal harvested on his farms in Eldoret and Kitale before the moratorium was issued by **Director of Forest Services**, the Respondent, on the 28th February, 2018. The application was granted on the 4th May, 2018 after the court observed that the Respondent had been served and had failed to enter appearance or file their replies.

(b) That the Respondent filed the Motion dated the 20th September, 2019 seeking for the order of 4th May, 2018 and extracted on the 14th May, 2018 to be stayed, reviewed and or set aside. The Applicant filed their replying affidavit sworn by Joel Madahana on the 18th October, 2019 and on the 5th November, 2019 filed the Notice of Preliminary Objection.

2. PRELIMINARY OBJECTION

(a) The preliminary objection seeks to have the application dated the 20th September, 2019 struck out on the following grounds;

“1. The application as framed and pleaded is fatally defective and incurable by amendment and out to be struck out in limine.

2. The court is bereft of jurisdiction to entertain the application before it.

3. The Applicant is guilty of non-disclosure of material facts pertinent to this suit and thus not entitled to benefit from the said orders.

*4. The Applicant has filed its application in breach of **Section 1A and 1B of the Civil Procedure Act, 2010** and is underserving of the court’s discretion.*

5. The Applicant has not met the threshold to warrant review and or setting aside of the issued on 4th May, 2018.

6. The application is therefore frivolous, vexatious and an abuse of the processes of this honourable court and ought to be dismissed with costs.”

(b) That when the application dated the 20th September, 2019 came up for interpartes hearing on the 6th November, 2019 Mr. Mutai and Mr. Kagunza, learned counsel for the Applicant and Respondent respectively agreed to deal with the Applicant’s preliminary objection first.

3. Mr. Kagunza, the learned Counsel for the Applicant, abandoned all the other grounds except number 2 of lack of jurisdiction on which he submitted. He submitted that the order of 4th May, 2018 sought to be stayed, reviewed and or set aside through the application dated 20th September, 2019 was by a Judge of concurrent jurisdiction to the Judge dealing with this matter. That a Judge should not interfere with the decision of another Judge of concurrent jurisdiction. That the only option the Respondent has in the matter is to go on appeal. The learned Counsel referred to the Court of Appeal decision of **Joseph Ndirangu Waweru t/a Mooreland Mercantile Company & Another Vs City**

Council of Nairobi [2015] eKLR, in which the decision in Civil Appeal No. 90 of 2005, Stephen Mwaura Njuguna Vs Douglas Kamau Ngotho consolidated with Civil Appeal No. 247 of 2007 was cited on the position that;

“the learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi, J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought.”

4. The learned counsel for the Respondent, Mr. Mutai submitted that the preliminary objection was frivolous, and vexatious as the Respondent has never been heard in this matter before today. That **Order 45 Rule 1 of Civil Procedure Rules** empowers the court to review the order of the Court even where the order was made by a Judge who has since left the station. That the preliminary objection should not be upheld as their application raises fundamental questions of procedure and the law. That upholding the preliminary objection will result to the Respondent being condemned unheard for the second time.

5. The following are the issues for the court’s determination;

(a) Whether the Applicant has established that the court is without jurisdiction in respect to the application dated 20th September, 2019 by the Respondent.

(b) Who pays the costs of the preliminary objection?

6. The court has carefully considered the ground of whether or not the court is with jurisdiction, the oral counsel’s submissions, the record and come to the following findings;

(a) That Motion upon which the Applicant has raised the preliminary objection is brought pursuant to **Order 10, Rule 11, Order 45 Rule 1, 2 and Order 51 of Civil Procedure Rules, Sections 1A, 1B, 3A, 63(c) and (e) and 80 of Civil Procedure Act** as shown at its heading. That **Order 45 Rule 1 of Civil Procedure Rules** makes provisions for applications for review of a decree or order. The application should be made to the court that **“passed the decree or made the order without unreasonable delay.”** That Rule 2(1) provides that;

“An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred in Rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed.”

That sub-rule 2 goes on to provide that;

“If the Judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing.”

That it was the position of the Applicant’s Counsel that as the Order of 4th May, 2018 was passed by Ombwayo J, who was then in this station. That at the start of the current court session the Honourable Judge went on transfer to Environment and Land Court, Kisumu and the current Judge, being one of concurrent jurisdiction with Ombwayo J, has no jurisdiction to hear and determine the application dated 20th September, 2019. That position is opposed by the learned Counsel for the Respondent. That the provision of **Order 45 Rule 2(2) of Civil Procedure Rules** set out above clearly allows the Judge in the station to hear and determine application for review of decree and order made by the Judge who have since left the station through transfer. That accordingly, the court finds that as the application dated the 20th September, 2019 is for review of the Order dated 4th May, 2018 and decree extracted thereafter, the court has jurisdiction to hear and determine it.

(b) That the decision cited by the Applicant’s Counsel of **Joseph Ndirangu Waweru t/a Mooreland Mercantile Company & Another** dealt with an appeal against a judgment in which the Honourable Judge had set aside a valid judgment of another Judge of concurrent jurisdiction among others. That in the current matter, the order being sought to be set aside was obtained exparte and the Respondent is seeking for an opportunity to be heard. That as shown in (a) above, this court has jurisdiction to hear and determine the application.

(c) That in view of the findings above, the Applicant’s preliminary objection to the Respondent’s application has no merit and is rejected.

(d) That the Applicant having failed in their preliminary objection will pay the Respondent’s costs.

7. That flowing from the foregoing, the Applicant’s preliminary objection filed on the 5th November, 2019 is rejected with costs to the Respondent.

Orders accordingly.

Dated and delivered at Eldoret this 20th day of November, 2019.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Mr. Aseo for Kagunza for Applicant.

Mr. Oyo for Oduor for Respondent.

Christine: Court Assistant