



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 151 OF 2016**

**DR. WILLIAM GACANI MBERIA.....RESPONDENT/PLAINTIFF**

**VERSUS**

**CHARLES KIRIMI MBUL.....APPLICANT/DEFENDANT**

**RULING**

1. This matter emanates from a Notice of Motion dated 17<sup>th</sup> September 2018 brought pursuant to provisions of provisions of **Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, CAP 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules**. The applicant seeks among others orders for review of the ruling dated 11<sup>th</sup> July 2018 dismissing his case with costs and reinstate the same for hearing.
2. Through his application and supporting affidavit, the applicant averred that there is new documentary evidence which could not be produced at the time the order was made. That there is a mistake and/or error apparent on the face of the record and that the court was misdirected by the defendant who concealed facts.
3. The applicant contends that he is the registered proprietor of **Land Reference No. Ntirimiti Settlement Scheme/417**, while the respondent owns **L. R. No.Ntirimiti Settlement Scheme/484**. The issue of boundary was raised by the defendant where the land registrar pegged the boundaries upon invitation by the parties. The respondent thereafter came on the site and trespassed on the applicant's land and secretly annexed a big portion of his land. Since the land registrar has fixed the boundaries it is no longer an issue of the boundaries but the trespass by the respondent which the court has jurisdiction in the circumstances to hear and determine the matter fully.
4. The respondent in response to the application filed a notice of Preliminary Objection dated 18.10.2018 and filed on 19.10.2018, whereby the respondent is challenging the validity of the application and the orders sought therein.
5. The issue for determination is **whether the prayer for review of the ruling delivered on 11<sup>th</sup> July 2018 is merited**.
6. When it comes to review of a decree or order, a court may only do so if there is discovery of new and important matter or evidence, mistake or error apparent on the face of the record or for any other sufficient reason. This is stipulated under **Order 45 Rule 1 of the Civil Procedure Rules** which provides that:

***“(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.”***

7. I perused the file and noticed that the applicant had filed a notice of appeal on 23<sup>rd</sup> July 2018 as he was dissatisfied with the whole of the ruling dated and delivered on 11<sup>th</sup> July 2018 This is the basis upon which the preliminary objection has been raised.

8. The Court of Appeal in the case of **Equity Bank Limited v West Link Mbo Limited [2013] eKLR** Githinji JA stated thus:

**“The procedure recognises that the Court has only jurisdiction to hear appeals but deems an intention to appeal as manifested by a Notice of Appeal as an appeal.”**

9. In the case of **Rosemary Wanjiru Njiraini v Officer in Charge of Station Molo Police Station & another [2019] eKLR**, Munyao Sila J stated as follows:

**“25. On my part, I am guided by the decisions of the Court of Appeal as noted in the above mentioned case of Haryanto vs ED & F Man (Sugar) Limited and as approved in the case of I.C Kamau Ndirangu vs Commercial Bank of Africa and Noradhco V Gloria Michele. The mere filing of a Notice of Appeal does not divest one of the right to file an application for review. A Notice of Appeal is nothing more than an intention to appeal which may or may not be pursued. It is indeed advisable to file a Notice of Appeal, if only to preserve one’s right to appeal, for an appeal cannot be filed if no Notice of Appeal is lodged and it does not always mean that every person who preserves that right of appealing by filing a Notice of Appeal will follow up on that right and file the appeal. If a substantive appeal is filed, then clearly, the same party cannot file an application for review, for in such instance, he will already have exercised his right of appeal.**

**26. It is therefore my holding that the fact that the applicant had filed a Notice of Appeal does not bar this court from entertaining the application for review. I will therefore proceed to determine the merits of the said application.”**

10. Sharing the same sentiments as the learned judge I proceed to determine the application based on its merits. I therefore find that the preliminary Objection raised by the respondent is not merited.

11. According to the applicant he seeks a review for several reasons. One is that there is new documentary evidence which could not be produced at the time of the order, there is a mistake and or error apparent on the face of the record and that he has sufficient reason to enable this court to review the order. He explained that the issue before the court is on trespass and not land boundaries as it was already determined by the land registrar.

12. In my Ruling dated 11.7.2018, I stated as follows;

*“In paragraph 4 of the plaint, it is pleaded that defendant when purchasing his land parcel no. Ntirimiti/Settlement scheme/484 went ahead and fraudulently annexed plaintiff’s land no. Ntirimiti/Settlement scheme/417. This is a clear indication that plaintiff’s complaint was anchored on interference of the boundary between the two parcels.*

...

*From the foregoing, I have no doubts that the dispute at hand is a boundary one.*

....

*In the present suit, the land registrar has even resolved the dispute. The problem is that plaintiff does not recognize the decision of the Land Registrar as binding. I therefore have to remind the plaintiff that the powers bestowed upon the land registrar to resolve boundary disputes are anchored on a statute and can’t be wished away.”*

13. It is trite law that a party is bound by his own pleadings. The analysis made by the court in the aforementioned ruling was derived from plaintiff’s own pleadings to the effect that the dispute at hand is a boundary one. The applicant in his application has not adduced any evidence to show that that is not the case or that the court made an error in the ruling.

14. Accordingly, I am of the view that the applicant has failed to fulfill the conditions that can justify a review. I therefore find that the application dated 17.9.2018 is unmeritorious and the same is hereby dismissed. The preliminary objection filed by the respondent dated 18.10.2018 is also dismissed. Each party to bear their own costs of the application and the preliminary objection.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Rimita for applicant

Kimaita for respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**