



**REPUBLIC OF KENYA**

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

**E.L.C. NO.225 OF 2000**

**COMMISSIONER OF LANDS.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**VERSUS**

**ISANGAWISHI GROUP RANCH.....INTERESTED PARTY**

**EX-PARTE: 1. EDWARD LENJO MUSAMULI**

**2. PASCALIN SHOLLO**

**3. MILTON M. MWIWANI**

**4. RICHARD MWABILI**

**5. BERNARD N. MBAYA**

**6. NOBERT LENJO MSHAMBA.**

**RULING**

1. By a Notice of Motion dated 29<sup>th</sup> October, 2012 the ex-parte Applicant seeks orders:-

- a) That this application be certified as urgent and service of the same be in the first instance dispensed with.*
- b) That pending the hearing of this application inter-partes, this Honourable Court be pleased stay the execution of the Warrant of Attachment issued on 18<sup>th</sup> July 2012.*
- c) That this Honourable Court be pleased to review its ruling delivered on 28<sup>th</sup> March, 2008 by varying and/or altering the order on costs to the extent that the same should be paid by ex-parte applicants, save for Mr. Edward Lenjo Musamuli, the first named ex-parte Applicant.*
- d) That upon grant of prayer 3 hereof, this Honourable Court be pleased to set aside the proclamation of attachment by Ms. Kathemu Auctioneers against the ex-parte Applicant's property dated 12<sup>th</sup> October, 2012, carried out in execution of the ruling herein.*
- e) That the costs of this application be borne by Mr. Norbert Lenjo Mshamba, the 6<sup>th</sup> ex-parte Applicant.*

2. The application is premised on the grounds that:-

- a) Mr. Edward Lenjo Musamuli, the named 1<sup>st</sup> Ex-parte Applicant, and the Applicant herein was never privy to the decision to institute this Judicial Review Proceedings.*
- b) Mr. Edward Lenjo Musamuli, the named 1<sup>st</sup> Ex-parte Applicant and the Applicant herein never gave authority to Mr. Norbert Lenjo Mshamba, or as the case may be, any other persons(s), to institute these proceedings and swear affidavits on his behalf.*

**c) Mr. Edward Lenjo Musamuli, the named 1<sup>st</sup> Ex-parte Applicant and the Applicant herein was never aware of the existence of this Judicial Review Proceedings until he was served with proclamation of attachment of his property by Ms. Kathemu Auctioneers dated 12<sup>th</sup> October, 2012.**

**d) The Interested Party herein and Ms. Kathemu Auctioneer are being less candid for they only proceeded against the Applicant's property while there are six persons who purportedly instituted the Judicial Review herein.**

**e) It would be proper, just and fair that the decreed costs herein be recovered from the sixth (6<sup>th</sup>) Ex-parte Applicant, Mr. Nobert Lenjo Mshamba, and perhaps together with all or any of the remaining Ex-parte Applicants, if indeed they were privy to the decision to institute this Judicial Review Application by giving him authority and/or consent.**

3. The application is also supported by an affidavit of Edward Lenjo Musamuli, the Applicant sworn on 29<sup>th</sup> October, 2012 in which he deposes inter alia, that he only came to learn of the Judicial Review Application herein when someone came to his house in Voi, introduced himself to his workers as an employee of Ms. Kathemu Auctioneers and left a proclamation with them. He further deposes that he instructed his family lawyer, Mr. Odongo who immediately retrieved the court file and perused it, where he discovered that Mr. Nobert Lenjo Mshamba whom he knew had instituted these proceedings and swore an affidavit in that respect on his behalf and purportedly on behalf of all Ex-parte Applicants, the Applicant included, without the authority of the Applicant. He states that he did not give authority to Mr. Nobert Lenjo Mshamba or any other person and does not know why Nobert Lenjo Mshamba dragged his name into these proceedings while he knew that he had no interest in Isangaiwishi Group Ranch. The Applicant contends that he reads mischief in the entire saga for the matter was filed without his knowledge, did not sign any document, never visited any lawyer's office to discuss the same and never spent any money on it, but when the Respondent executed for costs, they only went for his property. According to the Applicant, no property belonging to Nobert and the other Applicants were touched.

The Applicant avers that he has taken issue with Mr. Nobert Lenjo Mshamba who instituted these proceedings and not any other person.

4. The application is opposed by the Interested Party who filed grounds of opposition dated 27<sup>th</sup> November, 2017 to wit

**a) That the application is incurably defective and the same should be struck out.**

**b) That the Applicant died on 4.12.2012 and no application has been made to substitute the deceased estate.**

**c) That counsel for the Applicant has not taken any necessary steps to have the application prosecuted for the last five (5) years.**

**d) The cause of action with regard to the application is costs. A stay cannot be granted with respect to costs.**

**e) In the circumstances, the application has been overtaken by events and should be struck out with costs to the Interested Party.**

5. The Applicant and the Interested Party filed written submissions. I have considered all the issues raised in the application and the rival submissions. The application is said to be brought under the Inherent Power of the court. The main prayer it seeks is review of the ruling of the court delivered on 28<sup>th</sup> March, 2008 by varying and/or altering the order on costs to the extent that the same should be paid by the Ex-parte Applicants save for the Applicant herein.

6. Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, the grounds for review are limited to a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made, or; b) on account of some mistake or error apparent on the face of the record, or c) for any other sufficient reason, and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.

7. In the case of National Bank of Kenya Ltd Vs. Ndungu Njau (1997) eKLR, the Court of Appeal held that:-

**“A review may be granted whenever the court considers that it is necessary to correct 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 a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of law cannot be a ground for review.”**

8. In the instant case, the application is made principally on the ground that the Applicant was not privy to the decision to institute these proceedings. However, the Applicant is only restricting his application for review to the issue of costs. In my considered view, and going by the above authority and the law, the contention by the Applicant that it was not privy to the institution of these proceedings is not an issue that is self-evident. It requires an elaborate argument to be established. Such an issue which has been contested as in this case cannot be reviewed unless the entire proceedings are set aside.

9. The order sought to be reviewed was made on 28<sup>th</sup> March, 2008 and this application was filed on 29<sup>th</sup> October, 2012. This was a delay of about five (5) years. This delay was inordinate and not excusable.

I have looked at the affidavit in support of the motion and the submissions by the Applicant. The Applicant is not faulting the Interested Party in whose favour the order for costs was made.

10. For the reason of the foregoing, I find that the application has not passed the test for grant of the orders sought. Accordingly, the Notice of Motion dated 29<sup>th</sup> October, 2012 is hereby dismissed with costs to the Interested Party.

**Dated, signed and delivered at Mombasa this 19<sup>th</sup> day of April, 2018.**

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**C. YANO**

**JUDGE**