



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISC. 37 OF 2017

MUTUNGA KIINDU

MUTINDA MUIA PLAINTIFF/APPLICANT

VERSUS

JOSEPH MBOTI NDUNGI

JUSTUS MUNYAO MUTUA DEFENDANT/RESPONDENT

RULING

- 1) The applicant has by his notice of motion application dated **12/10/2017** and filed in court on **13/10/2017** sought to have the decree of the court issued on **17/1/2013** in *Makueni PMCC Land Dispute Tribunal Court no. 7 of 2013* be stayed, discharged, varied and or set aside and a fresh one to issue in conformity with the award issued on **17/1/2003**.
- 2) The application is predicated on the grounds that the decree orders of this court issued on **17/9/2013** are not in conformity with the award given on **17/4/2003**, that the award was to the effect that the disputed land should be shared equally between the families of claimant and objector using the laid down procedures, the family with the help of the clan should first sort out the costs incurred by the objector during the legislation (SIC) of the cases with his neighbours and further that each party do bear its own costs, that the decree did not conform to the award in the fact that it did not indicate that the family with the help of the clan should first sort out the costs incurred by the objector during litigation of the cases and therefore, in the interest of justice, the decree orders be stayed, be discharged, varied set aside and fresh decree in conformity with the award be issued.
- 3) The application is expressed to be brought under **sections 1A, 1B & 3 A** on the Civil Procedure Act and **order 40 rules 7** of the Civil Procedure Rules and all other enabling provisions of the Law. It is also supported by the affidavit of **Mutungua Kiindu** sworn on **12/10/2017**.
- 4) In summary, the application and the supporting affidavit are to the effect that the decree orders of *Makueni PMCC LDTC No. 7 of 2003* issued on **17/1/2013** are not in conformity with the award issued on **17/4/2013** and such the same should be stayed, discharged, varied, set aside and a fresh decree in conformity with the award issue.
- 5) For the avoidance of doubt, no order of injunction is sought to be discharged, varied, or set aside and such, the applicant moved the court under the wrong order of the Civil Procedure Rules. In my view, the applicant ought to have moved the court under **order 45 vide 1(1) (b)** of the Civil Procedure Rules which deals review of decree or orders in instances where appeal such as the one the applicant finds himself in is not allowed.
- 6) In the instant application, it is clear that there is an error and/or omission of decree. In my view the applicant ought to have filed an application for review before the principal magistrate's court **Makueni** which happens to be the court that issued the decree and not this court.
- 7) The court of Appeal had a chance to consider the circumstances under which review may be granted in the case of *National Bank of Kenya Ltd Vs Ndingu Njau in Civil Appeal No. 211 of 1996(UR)*.
- 8) The court held as follows,

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error on omission on the part of the court. The error or omission must be self-evident and should not require on elaborate argument to be established”

In the circumstances, my finding is that the application has no merits. The applicant is directed to file the application before the appropriate court. The application is hereby struck out with no orders as to costs since the first Respondent did not enter appearance nor did he file his

replying affidavit.

Signed Dated and Delivered on 23rd Day of November, 2017

Mr. Kwemboi Court Assistant

No appearance from N.O Makau & Mulei Advocates

MBOGO C.G

JUDGE