



REPUBLIC OF KENYA



KENYA LAW
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**M'Liburu & another v Kiriungi & 3 others (Civil Application
137 of 2019) [2024] KECA 1027 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1027 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 137 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

JOSEPH NKINDUKU M'LIBURU 1ST APPLICANT

SARAH KABURO IKUNYUA 2ND APPLICANT

AND

CATHERINE MUTHONI KIRIUNGI 1ST RESPONDENT

**TIGANIA EAST AND CENTRAL DIVISION LAND ADJUDICATION AND
SETTLEMENT OFFICER 2ND RESPONDENT**

DAVID KIMATHI KIRIUNGI 3RD RESPONDENT

**CHAIRMAN ANTUAMBURI LAND ADJUDICATION COMMITTEE 4TH
RESPONDENT**

*(Being an application for Review of the Judgment/order of this Court (Githinji,
Karanja, & Kiage JJA.) dated 23rd March, 2017 in Civil Appeal No. 21 of 2016)*

RULING

1. Before Court is the applicant's notice of motion dated 20th August, 2019 expressed to be brought under Article 47(1) and (3)(a) of the Constitution of Kenya, Section 11(1) (e) and (1) of the Fair Administrative Action Act, 2015 Sections 3(2), 3A (1) & (2) and 3B (1)(a) (b) & (c) of the Appellate Jurisdiction Act, Cap. 9 Section 80 of the CPA, Cap 21 and Order 45 rule 1(1) & (5) of the CPR 2010). The applicant prays that;
 - i) The judgment in Nyeri COA CA No 21 of 2016 dated 23/3/2017 be reviewed upon such terms as this Court may deem just and expedient.



- ii) Alternatively, the matter in dispute, being the ownership of the suit land measuring 6.84 acres comprised in land parcel numbers 3158, 6073, 11042 all within Antuamburi Adjudication Section in Meru County or any other parcels of land excised therefrom, be remitted to:
 - a. The Chairman, Land Adjudication & Settlement Officer, Tigania East Central Division, and
 - b. The Tigania East & Central Division Land Adjudication and Settlement Officer.
2. The application is predicated on the grounds on its face, and supported by an affidavit sworn by Sarah Kaburo Ikunyua on 20th August, 2019.

The applicant deposes that, the original dispute over ownership of the suit land had been settled by the Arbitration Board under sections 18(3) and 19 of the Land Consolidation Act, Cap. 283 in favor of the 1st applicant; the impugned decision was actually in an effort to have the earlier decision, which was final, implemented by being reflected in the Adjudication Register under the Provisions of Section 26(1) of the Land Consolidation Act, Cap. 283 and not a fresh claim to the land; with the judgment as it stands, the implementation decision has been quashed but leaving the Arbitration Board award of the same land to the 1st applicant intact thus creating a lot of confusion and rendering the Arbitration Board award of the suit land to the 1st applicant nugatory for want of implementation; yet the same has never been challenged to date; the said Arbitration Board award, was made after due participation of the late Secondo Kiriungi Germano (deceased) and during his life time;

3. The grounds continue to state that as at the time of making the impugned decision, the respondents had not yet been appointed Legal Representatives of the estate of the deceased as they were only appointed on 11th October, 2010 while the award was made on 8th July, 10; Section 12 of the Land Consolidation Act, Cap. 283 deals with Land Committee hearings to determine the existing rights of individuals at the initial stage of Land Adjudication process commonly referred to as 'gathering stage', so as to compile the Record of Existing Rights under Section 15 of Cap. 283 while the impugned decision was made in an Objection to the Adjudication Register under Section 26 which deals with accuracy, incompleteness or allocation of land in the Adjudication Register and NOT ownership thereof and for which the provisions of section 12 do not apply; there is need to remit the decision to the 1st and 2nd applicants for the reconsideration in the presence of the respondents so as to complete implementation of the existing and unchallenged Arbitration Board award.
4. It is clear from the above that the said depositions and averments are a regurgitation of the history of the claim prior to the hearing of the appeal before this Court. The application is opposed through the affidavit sworn by Catherine Muthoni Kiriungi, the 1st respondent, on 15th March, 2023 on her behalf and on behalf of the second respondent. It addresses all the issues raised above, but as this is not a rehearing of the appeal, we do not deem it necessary to repeat the same.
5. One of the pertinent issues raised, however, is that the Antuambiri Adjudication section was closed in 2017 upon the completion of the register; Title deeds have already been issued and there is nothing to send back for reconsideration as prayed in the alternative prayer.

According to the respondents, the matter has already been determined and the application should be dismissed.

6. We have considered the application, the rival affidavits and submissions by the parties. At the plenary hearing of the application learned counsel Mr. Mwarania and Mr. Carl Peters appeared for the applicants and the 1st and 2nd respondents respectively. They informed the Court that they would rely



on the submissions as filed and made no oral highlights. As stated earlier, this is not a rehearing of the appeal, which was heard and determined on its merits. What is before us is a review of that judgment.

We need from the outset to restate the jurisdiction of this Court on review of judgments. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Civil Application No NAI 307 of 2003, a 5 Judge bench Court held without any equivocation that it had no power to reopen an appeal that had been concluded.

7. Subsequently, however, this position seems to have ceded some ground with the enactment of the *Constitution* of Kenya 2010 when the Court revisited the said issue. This was mainly informed by the fact that with the establishment of the Supreme Court, this Court is no longer the court of last resort in all matters as it hitherto was. Secondly, the Court seemed to appreciate that human frailties and infallibility could sometimes result in grave injustice, and where that happens, then the court can step in and remedy the same.
8. However, our jurisdiction to review final judgments remains very narrow indeed and is exercised in very limited and deserving cases. This jurisdiction was explained in *Benjob Amalgamated Ltd and another v Kenya Commercial Bank Ltd* (2014)eKLR where the Court restated that the Court of Appeal has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. The emphasis here should be on errors of law. No error of law, or any other ground justifying review has been pointed out to us in the judgment sought to be reviewed. All the applicant has done is try and re-litigate the matter, and asking us to send the same back to a non-existent entity for further litigation.
9. We have perused our judgment, the subject of this application. The grounds of appeal before the Court were twofold: that the respondents herein had been denied of a hearing before the Arbitration tribunal, against the rules of natural justice; and on the composition of the tribunal. The appeal was allowed on the ground that the appellants were not heard before their land was taken away from them. The applicants did not file a cross-appeal, and there was no prayer before the Court that the matter be remitted to the tribunal for rehearing. Such a request could not, therefore, have been considered then, and nor can it be brought before us now for consideration. This is outside our jurisdictional remit.
10. This would amount to introducing fresh matters that ought to have been raised before the High Court or before this Court by way of cross-appeal. Those facts were always within the knowledge of the applicants, yet they chose not to raise them until two years later, by which time the respondents' rights had already crystalized and title deeds issued for the said property. There is no basis in law whatsoever for us to allow this application.
11. We are not persuaded on the merits of this application. Accordingly, we dismiss it with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL



A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

