



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 12 OF 2017**

**JOSEPH MAKAU MBOLE.....APPELLANT**

**VERSUS**

**DAVID MUTHOKA KANYUNYU.....RESPONDENT**

**J U D G M E N T**

1. By way of Plaintiff, the Respondent sued the Appellant claiming Special Damages and General Damages, costs and interest. It was pleaded that the Appellant sold a portion of land being Title No. **Mulango/Kithungi/161** at an agreed consideration of **Kshs. 7,500/=** on the **13<sup>th</sup> March, 1983**. By another agreement dated **10<sup>th</sup> June, 1983** the Appellant sold to the Respondent another portion of land at **Kshs. 8,000/=**. He paid **Kshs. 3,400/=** leaving a balance of **Kshs. 4,600/=**.
2. The Respondent was put in possession of both portions of land and developed it. The Appellant commenced the transfer of the portions of land to the Respondent but later changed his mind.
3. By a letter dated **6<sup>th</sup> April, 2006** the Appellant termed the Respondent a trespasser and gave him ten (10) days within which to vacate the suit land, hence his claim for the sum paid, **Kshs. 10,900/=** and **Kshs. 20,600/=** Special Damages for the development on the land and General Damages.
4. The Appellant failed and/or neglected to enter appearance. The matter proceeded to Formal Proof, Judgment was entered for the Respondent for the sum of **Kshs. 50,600/=**, for Special and General Damages plus **Kshs. 10,900/=** with interest and costs and a Decree was drawn. Consequently execution proceeded. The Judgment Debtor (Appellant) appeared in Court and disputed the sum owing arguing that he had paid what he owed through the area Chief. He was committed to jail on the **3<sup>rd</sup> February, 2009** for a duration of six (6) months. Having not paid the outstanding sum of **Kshs. 150,692/=**, the mode of execution was changed to attachment of property.
6. On the **13<sup>th</sup> October, 2009** the Appellant filed an application seeking to set aside a public auction of **LR No. Mulango/Kithungi/161** scheduled for **22<sup>nd</sup> October, 2009** by **Max Auctioneers** on the ground that service was not proper and he had a good defence. The learned trial Magistrate **Hon. T. M. Mwangi** found no reason to exercise her judicial discretion and dismissed it.
7. The Appellant having instructed **Kalili & Co. Advocates** filed a Notice of Motion dated the **27<sup>th</sup> day of April, 2010** seeking review of the ex-parte Judgment dated **10<sup>th</sup> November, 2008** on the grounds that the contract of sale between the Appellant and Respondent was void for want of consent of the Local Land Control Board under the **Land Control Act** and no damages are payable to a void contract.
8. In an affidavit in support of the application, the Appellant deposed that he entered into an agreement for sale of a portion of land **Mulango/Kithungi/161** at an agreed purchase price of **Kshs. 7,500/=** and later they entered into another sale agreement for a sum of **Kshs. 8,000/=** but the Respondent did not pay the entire purchase price. That the transaction was barred for failure to obtain a consent from the Land Control Board and he refunded the entire sum **Kshs. 11,900/=** at the office of the Chief **Maluku Location** and believed that the Respondent would be notified to collect the sum and therefore the Respondent had no claim against him.
9. The Respondent through the firm of **J. M. Muinde & Co. Advocates** filed Grounds of Opposition stating that the application was bad in law and incurably defective as there being no error apparent on record to warrant a review of the Court's Judgment. That the Appellant had not gone before the Court with clean hands owing to the inordinate delay in instructing an Advocate and filing the application.
10. He also filed a Replying Affidavit where he deposed that the Application was the second in a row by the Appellant which was meant to reverse the wheels of justice. That there was absolutely no error on record for the Court to review. That he sued the Appellant seeking refund of the purchase price, Special Damages for developments on the land and damages for breach of contract. That he could not have sued for recovery of land sold as time had lapsed with regard to obtaining consent after sale.
11. Further, he averred that the Appellant himself sent him a demand letter dated the **6<sup>th</sup> day of April, 2006** calling him a trespasser and gave

him ten (10) days to vacate the land, deliberately failing to disclose that he had purchased the land or that he had refunded the consideration paid. That through his Lawyer he responded by a letter dated **12<sup>th</sup> April, 2006** stating that the Appellant should refund the money and pay him for developments on the land. That he has never received any communication from the Chief requiring him to collect the refund and the application is a mere afterthought.

12. The learned trial Magistrate considered the application and reached a finding that the delay in bringing of the application was unexplained. That the application was made to prevent the loss of **Land Parcel No. 161** to the Respondent. That the Appellant wished to keep his land and at the same time not pay the decretal sum. That the disposal of **Land Parcel No. 161** was pursuant to execution proceedings in the suit and not pursuant to an agreement between the parties.

13. To ensure justice was done, she directed the Executive Officer to sign relevant documents to complete execution proceedings to transfer the **Land Parcel No. 161** to the purchaser at the auction sale and the excess sum of **Kshs, 94,000/=** to be paid to the Appellant.

14. Aggrieved by the Ruling, the Appellant appealed on grounds that the learned Magistrate erred in law and fact by failing to appreciate the fact that the suit before him was incompetent, bad in law and to consider and appreciate that he (Appellant) had no chance of defending the suit; Each party should have been heard on merit; he was condemned unheard; That the order requiring the Executive Officer to sign the relevant transfer documents was done without being pleaded; and that the application was brought under the right provisions of the law.

15. The Appeal was canvassed by way of written submissions. The Appellant stated that the Court did not accord him the opportunity of being heard. That he should be given the opportunity of being heard.

16. In response **Mr. Kilonzi**, learned Counsel for the Respondent submitted that the claim was not about land but money received from the Respondent totaling to **Kshs, 10,900/=** with interest pursuant to a sale agreement. **Kshs, 20,600/=** being Special Damages for development done by the Respondent and General Damages for breach of contract. Execution was done to realize the sum. That after the application to set aside a Notice of Sale was dismissed, execution was carried out.

17. That the application was brought **1½ years** after Judgment. That the Appellant was aware of the Judgment as he had filed another application that was dismissed, and in that particular application he never sought review. That the Appellant failed to give sufficient reasons to have the matter reviewed. That the Appellant did not apply to set aside the exparte Judgment and has never appealed against him.

18. My duty at this stage is to re-consider afresh what transpired before the trial Court and come up with my own conclusions.

19. An application for review of Decree or order is provided for in **Order 45 Rule 1** of the **Civil Procedure Rules** that state as follows:

*“(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.*

*(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”*

19. In the case of **National Bank of Kenya Limited vs. Ndungu Njau (Civil Appeal No. 211 of 1996)** (unreported) the Court of Appeal stated that:

*“A review may be granted whenever the court considers that it is necessary to correct an 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 provision of law cannot be a ground for review..... the learned Judge..... Made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise..... the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.....”*

20. In the application it was not alleged that a new and important matter or evidence had been discovered after due diligence that necessitated review. It was not suggested that there was a mistake or error apparent on the face of the record that made a review necessary.

21. It was also not outrightly alleged that there was another sufficient reason that would move the Court to review its order.

22. **Mr. Kalili** learned Counsel for the Applicant (Appellant) urged that the contract of sale by the Appellant and Respondent was void for want of consent of Land Control Board. Evidence adduced at the stage of Formal Poof established as pleaded that the claim was not for land but for recovery of a consideration paid to the Appellant which he acknowledged when he was compelled to appear in Court at the stage of

execution.

23. This is a matter where an interlocutory Judgment was entered pursuant to the provisions of **Order 10 Rule 6** of the **Civil Procedure Rules**. Consequently the Respondent set down the suit for hearing and the Court proceeded to hear the Formal Proof whereafter Judgment was delivered on the **10<sup>th</sup> day of November, 2008**.

24. Procedurally such a Judgment can be set aside. **Order 10 Rule 11** provides thus:

*“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”*

25. The Appellant appeared in Court on the **3<sup>rd</sup> February, 2009** when he was committed to Civil Jail. He was released but made no effort of applying for setting aside of the Judgment. He waited until **27<sup>th</sup> April, 2010** to come up with the application for review. This was after two (2) other application for execution were canvassed. The land in issue was sold at the execution stage. There was therefore no other sufficient reason to prompt the Court to grant the relief sought.

26. In the case of **Francis Origo & Another vs. Jacob Kumali Mungala (C.A. Civil Appeal No. 149 of 2001)** (unreported) it was stated as follows:

*“... an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.”*

27. The learned trial Magistrate considered the application which was found to be baseless. No good ground was put before the Judicial Officer that called for review of the Exparte Judgment dated **10<sup>th</sup> November, 2008**.

28. In the circumstances, I find the decision of the trial Magistrate not having been erroneous. Therefore I find the Appeal lacking merit. Accordingly, it is dismissed with costs to the Respondent.

29. It is so ordered.

**Dated, Signed and Delivered at Kitui this 25<sup>th</sup> day of September, 2018.**

**L. N. MUTENDE**

**JUDGE**