



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL CASE NO 15 OF 2017

GEORGE ANTONY MWANGI GICHINA (Administrator of the

Estate of the late HANNIEL GICHINA MWANGI APPELLANT

VERSUS

JOE MWANIKI MWANGI 1ST RESPONDENT

JANE WANGARI MWANGI 2ND RESPONDENT

EMMAH KABURA MWANGI 3RD RESPONDENT

RULING

1. On 23/2/2018, this court [Gacheru J] rendered a judgment in this appeal. The issues identified for determination by the court were as follows: (i) Was the suitland held in trust by the defendant [deceased appellant] for the plaintiffs [respondents]? (ii) Who is the rightful owner of all the suitland and did the court appreciate the principles of land registration in determining ownership of the suitland? (iii) Was there fraud in registering the land in the name of the appellant and was it proved as per the legal requirements? (iv) Was the suit time-barred? and (v) Did the court have competent jurisdiction to entertain the suit?

2. This court considered the record of the trial court, the evidence tendered before the trial court; the issues canvassed before the trial court; and the findings of the trial court, and came to the following findings on the identified issues in this appeal: (i) the respondents did not prove the element of trust to the required standard in the trial court; (ii) the appellant was the absolute and indefeasible registered proprietor of the suit property and therefore the rightful owner whose rights could not be defeated; (iii) the respondents had failed to prove fraud in the registration of the appellant as proprietor of the suit property; (iv) the respondents' suit was time-barred under the Limitation of Actions Act, Cap 22; and (v) the appellant having pleaded the question of jurisdiction and having elected to abandon the question during trial, he was precluded from raising it in this appeal.

3. Consequently, this court [Gacheru J] allowed the appeal, set aside the judgment of the trial court; and substituted the final order of the trial court with an order dismissing the respondents' suit in the trial court.

4. Subsequently, on 2/5/2018, the firm of *Karuga Wandai & Co Advocates* [representing the respondents in this appeal] lodged an appeal against the judgment of this court dated 23/2/2018 by lodging a notice of appeal dated 8/3/2018. Subsequent to that, on 7/5/2018, the same law firm brought a notice of motion dated 3/5/2018, inviting this court to review, vary and or set aside its judgment dated 23/2/18. The said application is the subject of this ruling.

5. The application was supported by the affidavit of **Joe Mwaniki Mwangi** sworn on 3/5/2018. He deposed that he was aggrieved by the judgment of this court and he had lodged an appeal in the Court of Appeal. He added that, pending the preparation of the record of appeal, he had decided to apply for review of the judgment of the court. He further deposed that there was discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge and could not be produced at the time when the decree was passed. Mr Mwangi added that there was a mistake or error apparent on the face of the record in that, despite the court finding that there was trust it failed "to determine the same by way of declaration". He added that "the issues framed by the appellant were not within the knowledge of the respondents and neither were they within the knowledge of the trial court therefore there was material error on the face of the record as the judgment created an impression that the same had been canvassed by the parties." [the text is reproduced verbatim]. Lastly, he deposed that **Rahab Wanjiku** [mother to both the appellant and the respondent] was "mind-bended by the appellant into gifting the appellant land to be held for the trust of himself and the respondents when indeed evidence was available that the aforementioned **Rahab Wanjiku** had a history of chronic dementia." [text is produced verbatim].

6. The application was canvassed through brief oral submissions. Mr. Nyambura Mwangi, counsel for the applicant, submitted that there was new evidence in form of a medical report relating to Rahab Wanjiku which confirmed that the said Rahab Wanjiku suffered a stroke. He contended that the said medical report could not be availed during trial because the Hospital did not avail it in good time. He added that the court made an error in finding that there was no trust. He urged the court to allow the application.

7. The appellant opposed the application through grounds of opposition dated 18/7/2018 and a notice of preliminary opposition of even date. The gist of the appellant's grounds of objection was that the applicants had not presented sufficient grounds to warrant a review of the judgement in this suit. The appellant contended that the applicant had not met the criteria for review. The preliminary objection was anchored on the fact that the appellant was deceased.

8. In brief submissions, **Wanjiku Mwangi**, counsel for the appellant, argued that the application was an afterthought. Counsel added that the applicant had failed to satisfy the grounds for review as stipulated in the Civil Procedure Rules. Counsel contended that the issue of dementia was dealt with both by the trial court and this court. Counsel noted that there was no new evidence. He observed that the appellant had acknowledged existence of an appeal. Counsel urged the court to dismiss the application.

9. The court has considered the application, the response to the application; and the parties' respective submissions. The court has also considered the relevant legal framework and jurisprudence. The single question falling for determination in the application is whether the application meets the criteria upon which this court exercises jurisdiction to review its judgments.

10. This court's jurisdiction to review its judgments is regulated by the framework in **Section 80** of the **Civil Procedure Act** which provides as follows:-

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

11. The jurisdiction is further regulated by the framework in **Order 45 rule 1** of the **Civil Procedure Rules** which provides as follows:

“1. (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.”

12. The Court of Appeal in **Daniel Macharia Karagacha v Monicah Watithi Mwangi**, Civil Appeal No. 159 of 2000 rendered itself on the criteria upon which the jurisdiction to review a judgment is exercised as follows:

“Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application.”

13. The Supreme Court of India in the case of **Afit Kumar Rath v State of Orisa & others** (a Supreme Court case)⁵⁹⁶ at page 608 rendered itself on how this jurisdiction is exercised in the following words:

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 rule 1 means a reason sufficiently analogous to those specified in the rule.”

14. In the present application, the applicant stated unequivocally that there is a pending appeal and that this application was brought pending the preparation of the record of appeal. On that ground alone, this application is fatally incompetent. Under **Section 80** of the **Civil Procedure Act** and **Order 45 rule 1** of the **Civil Procedure Rules**, the right to apply for review is not available to a party who has elected to prefer an appeal against a decision. Without saying much, this application fails wholly on that ground.

15. Secondly, it is apparent from the documents presented by the applicant that approximately 40 days after this court rendered a judgment in this appeal, the appellant approached **St Matia Mulumba Mission Hospital**, made payment of Kshs 2500, and procured the three sentence document which he is using as a basis to review the judgment herein. He has not told the court what prevented him from procuring the document during trial of this suit in the subordinate court. In the circumstances, I do not find merit in the application dated 3/5/2018.

16. Consequently, my finding on the single issue in the application dated 3/5/2018 is that the application is incompetent. Secondly, the application has failed to satisfy the criteria upon which the jurisdiction to review a judgment is exercised. Consequently, the application is rejected. The applicants shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Mwangi for the Respondents

Court Assistant: Phyllis Mwangi