REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 98 OF 2009

JOHN NYAGECHI OMBATI ……..……..…….....……. APPELLANT

VERSUS

CALLEN ONGIGE OMBOGO ….…….……..…….. RESPONDENT

JUDGMENT

(Being an appeal from the Ruling of the Senior Resident Magistrate's Court at Nyamira, Hon. L. Komingoi in SRMCC No. 12 of 1995 dated 24th April, 2009)

1. **Introduction**

The appellant filed a suit at the District Magistrate's court at Nyamira against the respondent on 27th February 1995 namely; **Nyamira DMCC No. 12 of 1995, John Nyagechi Ombati vs. Callen Ongige Ombogo** (hereinafter referred to only as "**the lower court case or the lower court**" where the context so admits) seeking general damages. The appellant amended his plaint on 5th June 1996 and sought general damages and mesne profits against the respondent. In his amended plaint, the appellant averred that he is the registered proprietor of all that parcel of land known as **LR No. North Mugirango/Boisanga/2535** (hereinafter referred to as "**the suit property**") and that a portion of the said parcel of land measuring 2 acres was occupied by the respondent's trees numbering 1308. In the body of the amended plaint, the appellant averred that his claim against the respondent was for the removal of the said trees from the said portion of the suit property which they occupy, mesne profits until the trees are removed and general damages for nuisance. In the reliefs sought however, the appellant only prayed for mesne profits and general damages. In her statement of defence to the amended plaint, the respondent denied that she had planted trees on a portion of the suit property as claimed by the appellant. The respondent contended that the trees which were the subject of the appellant's complaint were on her own parcel of land and not on the suit property.

2. On 17thJuly 1997, the dispute between the parties was referred to arbitration by the District Officer Ekerenyo Division assisted by two (2) elders. The said reference was made by consent of the parties. The said District officer filed his award in court on 21st July 1998. In the award, the said District Officer and his panel of elders made a finding that the dispute between the appellant and the respondent revolved around the boundary between the suit property owned by the appellant and **LR No. North Mugirango/Boisanga/232** ("hereinafter referred to only as "**PlotNo. 232**") owned by the respondent. They ordered that the two parcels of landbe surveyed and the boundary thereof be re-established so as to tally with measurement of the suit property which is

0.87ha. according to its title deed. The said award was read to the parties on 14th October 1998 and adopted as a judgment of the court on 19th November 1998. No further action was taken in the matter until 19th December 2006 when the appellant moved the court with an application seeking the arrest and committal of the respondent to civil jail for disobeying an order of the court that was purportedly issued on 20th June 2006. The application was opposed by the respondent. Before this application was heard and determined, the appellant filed yet another application on 2nd May 2008 this time round seeking among others, an order that the respondent be evicted from the suit property in accordance with the order issued by the court on 19th November 1998. This application was not opposed by the respondent who seems to have had problems with her advocates. The application was heard by L. Komingoi, SRM who in a ruling delivered on 3rd December 2008 allowed the same as prayed. The court ordered the eviction of the respondent from the suit property by the District Officer Nyamira, District with the assistance of the O.C.S Nyamira Police Station. The court also condemned the respondent to pay the costs associated with her eviction and the costs of the application.

3. **The application for review of the orders made on 19th November 1998 and 3rd December 2008:-**

On 25th March 2009, the respondent filed an application by way of Notice of Motion of the same date seeking the review and setting aside of the order for the eviction of the respondent from the suit property that was made on 3rd December 2008 and the order of 19th November 1998 that adopted the award of the District Officer Ekerenyo Division as a judgment of the court. The application by the respondent was brought on the grounds that; there were mistakes and/or errors apparent on the face of the records of the said orders, the said orders were made as a result of a mistake on the part of the advocates for the respondent that should not be visited upon the respondent, the respondent stood to suffer prejudice unless the application was granted and that, it was in the interest of justice that the application be allowed. In her affidavit in support of the application, the respondent pointed out the apparent mistakes and/or errors on the face of the said orders as follows:-

a. In his award that was adopted by the court as a judgment on 19th November 1998, the District Officer, Ekerenyo Division had introduced Plot No. 232 that was not the subject of the suit between the parties in the lower court.
b. The said parcel of land (Plot No. 232) was registered in the name of the respondent's deceased husband, one, James Ombogo.
c. The respondent had no capacity to be sued in respect of the said parcel of land as she was not the legal representative of the estate of the said James Ombogo.
d. The award by the District Officer, Ekerenyo Division that was adopted as a judgment of the court on 19th November 1998 did not contain an order for the eviction of the respondent from the suit property.
e. The order made by the court on 3rd December 2008 was erroneous in that it had no basis in the judgment that was made by the court on 19th November 1998 following the adoption of the award by the District Officer, Ekerenyo Division aforesaid.

4. The respondent's application was opposed by the appellant. The appellant contended that there were no good grounds that would justify the review of the orders made in the lower court on 19th November 1998 and 3rd December 2008. The appellant contended that there were no errors or mistakes apparent on the face of the said orders. The respondent's application was heard by L. Komingo, SRM who allowed the same on 29th April 2009. In her ruling, the learned Senior Resident Magistrate made a finding that the District Officer, Ekerenyo Division had in his award introduced a new parcel of land in the proceedings namely, Plot No. 232 that was not owned by the respondent and in respect of which the respondent could not be sued. The learned Senior Resident Magistrate held that the introduction of the said Plot No. 232 which had not been pleaded by the parties was an error apparent on the face of the record. The learned Senior Resident

Magistrate also took issue with that part of the award that directed that a survey be done to establish the boundaries of the parcels of land that were in dispute. The learned Senior Resident Magistrate held that this order was erroneous in that the appellant had not sought such prayer in his plaint. The learned Senior Resident Magistrate also held that the orders issued on 3rd December 2008 were erroneous because the same were not based on the judgment of the court that was delivered on 19th November 1998 that had not ordered for the eviction of the respondent from the suit property. The learned Senior Resident Magistrate held that the respondent had established valid grounds that justified the review of the order made on 3rd December, 2008 and the judgment of the lower court that was delivered on 19th November 1998.

5. **The appeal before this court:-**

The appellant was aggrieved with the said decision of the learned Senior Resident Magistrate and preferred an appeal to this court. In his memorandum of appeal, the appellant challenged the decision of the learned Senior Resident Magistrate on three (3) grounds namely:-

i. **That the learned trial magistrate erred in law in reviewing the judgment of J. Kiarie SRM dated 19th November 1998 and/or court decree without applying her mind to the correct principles of law governing review.**
ii. **That the learned trial magistrate erred in law in reviewing its order dated 3rd December 1998 when the same had been executed and as such there was nothing to review.**
iii. **That the trial magistrate erred in law and in fact in reviewing its orders dated 3rd December 2008 without taking into account the provisions of Order XLIV Rules 1 and 2 of the Civil Procedure Rules.**

The appellant urged this court to set aside the ruling of the learned Senior Resident Magistrate made on 29th April 2009 and reinstate the judgment dated 19th November 1998 and the order of 3rd December 2008 a foresaid. I have considered the record of the lower court including the respondent's application for review and the ruling of the learned Senior Resident Magistrate dated 29th April 2009 on the same. I have also considered the appellant's grounds of appeal and the written submissions filed by the advocates for both parties. I would consider the appellant's grounds of appeal one after the other. Where necessary, I may consider two or more grounds of appeal together.

6. **Ground I of appeal:**

I am in agreement with the submission by the appellant that in reviewing the judgment made on 19th November 1998, the learned Senior Resident Magistrate did not apply correctly the principles of law that governs applications for review of orders and decrees. As was contended by the appellant before the lower court, there were completely no good grounds that had been put forward by the respondent that would have justified the review of the judgment of the lower court dated 19th November 1998 that was entered following an arbitration award. The respondent's application before the lower court was brought under Order XLIV of the repealed Civil Procedure Rules that provided that; any person considering himself aggrieved by a decree or an order from which no appeal has been preferred or from which no appeal is allowed can apply to court for the review of such order or decree. The court could only allow the application for review if satisfied that; the applicant had discovered new and important matter or evidence which he could not after exercise of due diligence place before the court when the order was made or decree passed or that there was some mistake or error apparent on the face of the record or for any other sufficient reason. The application could also not be granted unless the same was brought without unreasonable delay. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal at Nairobi Civil Appeal at Nairobi Civil Appeal No. 211 of 1996(unreported)** the court stated that:

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must**

be self evident and should not require 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 law. Misconstruing a statute or other provision of law cannot be a ground for review."

7. In the case of **Nairobi City Council –vs- Thabiti Enterprises Ltd, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1996 (unreported)**, it was stated that;-

> **"The current position would then, appear to be that the court has unfettered discretion to review its own decree or order for any sufficient reason."**

The respondent's application in the lower court was brought on the ground that there was an apparent error or mistake on the record of the judgment of 19th November 1998. The alleged error or mistake was cited as the arbitrator's alleged introduction of Plot No. 232 in his award and the arbitrator's order for the survey to be carried out on the disputed properties notwithstanding the fact that the appellant had not sought that relief in his plaint. The learned Senior Resident Magistrate agreed with the respondent that there were errors and/or mistakes on the record of the judgment of 19th November 1998 that justified the review the said judgment. I am of the view that the learned Senior Resident Magistrate fell into error in reviewing the judgment of 19thNovember 1998 on the basis of the alleged errors or mistakes on the face thereof.

8. It is not in dispute that the dispute between the appellant and the respondent in the lower court was referred to arbitration by the court. The whole dispute was referred to the arbitrator for determination. Neither the parties nor the court drew issues for determination by the arbitrator. The arbitrator was therefore given a free hand to determine not only the issues that were raised in the parties' pleadings but also the issues that were raised before him by the parties and their witnesses. The arbitrator after hearing the parties and their witnesses came to the conclusion that the dispute between the appellant and the respondent revolved around the boundary of the suit property that was owned and occupied by the appellant and Plot No. 232 that was owned and occupied by the respondent. Having reached this conclusion, the arbitrator formed the view that the only way to resolve the dispute was for a survey to be carried to determine the said boundary and he proceeded to make an award along those lines. It is clear from the proceedings before the arbitrator that the dispute between the appellant and the respondent was over a boundary between the suit property and Plot No. 232 which was occupied by the respondent. Whereas the appellant had contended that the respondent had while planting trees on Plot No. 232 exceeded the boundary of the said Plot and planted some trees on the suit property, the respondent maintained that the said trees were within Plot No. 232.
9. The arbitrator's award was filed in court and read to the parties after which the same was adopted as a judgment of the court on 19th November 1998. The said award was adopted as a judgment of the court in its original form. The court was not called upon to either amend it or modify it for any reason. The respondent had a right to move the court to modify or correct the said award, or to have it remitted to the arbitrator for reconsideration or to have it set aside altogether. The application should have been made under Order XLV rules 12, 13 and 14 of the repealed Civil Procedure Rules before the award was adopted as a judgment of the court. The said award could have been amended or corrected if either party was of the view that the arbitrator had dealt with a matter that had not been referred to him for arbitration or that it was imperfect in form or contained an obvious error. I am of the opinion that the grounds that the respondent had raised before the lower court for the review of the judgment dated 19th November 1998 should have formed a basis for an application for the modification or correction of the award, or for the remission of the award back to the arbitrator for reconsideration. In her application for review, the respondent directed her attack to the arbitrator's award and not the judgment of 19th November 1998.
10. I am of the opinion that there was no error or mistake apparent on the face of the record of the judgment of 19th November 1998. In its judgment of 19th November, 1998, the lower court as I

have stated above, adopted the arbitrator's award without any variation. If there was any error or mistake, it could only have been contained in the award but not in the said judgment of the lower court. Errors or mistakes in an arbitrator's award could not be reviewed by the court under order XLIV of the repealed Civil Procedure Rules. The same had to be dealt with under the four corners of Order XLV of the repealed Civil Procedure Rules. The provisions of Order XLV rules 12, 13, 14 and 15 of the repealed Civil Procedure Rules were enacted for that purpose. A party who has failed to challenge an arbitration award under order XLV within the prescribed time could not be allowed to launch such attack under order XLIV of the repealed Civil Procedure Rules after the award has been adopted as a judgment of the court. I am of the view that it was the intention of the legislature that all objections to an arbitration award be dealt with before the award was adopted as a judgment of the court. Even if it is assumed that the court had the power under Order XLIV of the repealed Civil Procedure Rules to re-open for examination an arbitration award that had been adopted as a judgment of the court on any of the grounds set out under that order, I am not satisfied that the said arbitration award or judgment had any error or mistake apparent on the face thereof.

11. As I have stated above, the arbitrator had a free hand to determine the dispute that existed between the appellant and the respondent. In the circumstances, the arbitrator did not fall into error at all in mentioning Plot No. 232 in his award and also in ordering that a survey be conducted to determine the boundary between Plot No. 232 and the suit property. The issue that Plot No. 232 was not pleaded and that the appellant had not prayed for an order for survey to be conducted could only arise if the matter was heard by the court. Once the dispute was referred to arbitration and the arbitrator given a free hand to determine the same, the rules of pleadings ceased to apply. The upshot of the foregoing is that the learned Senior Resident Magistrate erred in reviewing and setting aside the lower court judgment made on 19th November 1998. I am also in agreement with the appellant that the application for review was brought after unreasonable delay which delay has not been adequately explained. A delay of over 10 years in bringing an application for review is by any standard inordinate and unless satisfactorily explained should have disentitled the respondent to an order for review.

12. **Grounds II and III of appeal.**

As I have stated above, the award by the District Officer Ekerenyo Division was adopted as the judgment of the court on 19th November 1998. In the said award, there was no order for the eviction of the respondent from the suit property. This fact is not disputed. The judgment that was made by the lower court pursuant to the said award did not also contain an order for the eviction of the respondent from the suit property. In his application dated 18th April 2008, the appellant sought an order for the eviction of the respondent from the suit property purportedly pursuant to the said judgment that was made by the lower court on 19th November 1998. Since neither the arbitration award nor the judgment that was made on 19th November 1998 following the adoption thereof provided for the eviction of the respondent from the suit property, the learned Senior Resident Magistrate erred in her ruling made on 3rd December 2008 in which she ordered for the eviction of the respondent from the suit property. The court was misled by the appellant to believe that the order that was made by the court on 19th November 1998 upon the adoption of the arbitrator's award had directed for the eviction of the respondent from the suit property. In her ruling (see page 134 of the record), the learned Senior Resident Magistrate stated as follows:-

> **"The main ground relied upon is that this court on 19th November 1998 ordered that the Defendant/Respondent do vacate the plaintiff's parcel of land that despite the order the Defendant has refused to move her trees. ……I have considered the application herein and the supporting affidavit. The orders of 19th November 1998 have not been challenged. I find that this application is merited and I grant the orders sought …."**

13. Since the judgment entered by the lower court on 19th November 1998 did not order for the eviction of the respondent from the suit property, there was an error apparent on the face of the

record of the ruling/order of the learned Senior Resident Magistrate made on 3rd December 2008. The decision of the learned Senior Resident Magistrate was made on the basis of an order that did not exist on the court record. I am in agreement with the respondent's advocates that the learned Senior Resident Magistrate acted within the law in reviewing the said order of 3rd December 2008 on account of apparent error on the face of the record. The learned Senior Resident Magistrate had the power to correct the error. I am not in agreement with the submission by the appellant that since the erroneous order had been executed, the court was barred from reviewing the same. An erroneous order is a nullity. The same applies to the execution thereof. The lower court had jurisdiction under Order XLIV of the repealed Civil Procedure rules to review and set aside a null and void order whether executed or not. For the foregoing reasons, I am not in agreement with the contention by the appellant that the learned Senior Resident Magistrate erred in setting aside her order of 3rd December, 2008.

14. **Conclusion:-**

In conclusion, the appellant's appeal succeeds in part. That part of the lower court's ruling and order made on 29th April 2009 that reviewed and set aside the judgment of the said court made on 19th November 1998 is hereby set aside. The said judgment of 19th November 1998 is reinstated accordingly. The other part of the said decision that reviewed and set aside the said court's order of 3rd December 2008 is upheld. Each party shall bear its own costs of this appeal and the application in the lower court that gave rise thereto. Orders shall issue accordingly.

Delivered, signed and **dated** at **KISII** this **13th day** of **February, 2015.**

S. OKONG'O

JUDGE

In the presence of:-

Mr. Moseti h/b for Mr. Momanyi	for the appellant
N/A	for the respondent
Mr. Mobisa	Court Clerk

S. OKONG'O

JUDGE