



REPUBLIC OF KENYA

High Court at Nyeri

Civil Appeal 44 of 2010

SAMUEL OBONYO MUDUDA.....APPELLANT

Versus

WARERA GNOFNAH.....RESPONDENT

*(Appeal arising from the ruling of Hon.H.N. Ndungu
Senior Principal Magistrate Nanyuki in Civil suit No. 34 of 2004)*

JUDGMENT

1. This is a judgment in an appeal against the ruling of the Senior Principal Magistrate Nanyuki delivered on 10th March 2010 on a chamber summons dated 24th December 2009 brought under order XXI rule 22 and order XLIV rule 1 and 2 of the then Civil Procedure Rules in which the respondent sought the following Orders:

1. That the application be certified urgent

2. That there be a stay of execution relating to the decree in the matter herein pending the hearing and determination of the application herein.

3. That the warrant of arrest issued against the defendant on the 23rd December 2009 be lifted.

4. That the honourable court be pleased to review and or set aside its orders/decree/judgment issued in the matters herein.

2. It was based among other grounds that there was a discovery of a new and important matter and was discovered after the exercise of due diligence and that the court did not consider the counter-claim in the suit despite evidence being tendered thereon

3. It was supported by the affidavit of KIPROTICH WILLIAM KIGET the respondents advocate on record.

4. In opposition to the said application the appellant's advocates ONWONGA WILLIAM sworn a replying affidavit wherein he deponed that the application does not meet the legal requirements regarding stay of execution and review and that there was no order or decree to be reviewed since there was a valid judgment.

5. It was further deponed that there was no discovery of a new and important matter to warrant a review of the courts judgment and that the court had considered the appellants claim and the respondent counter claim and arrived at the right conclusion as demonstrated in the judgment itself.

6. It was further deponed that there was no error on the face of the record the entire proceedings and final judgment and that the respondent should have appealed against the judgment.

7. On that application the court ruled that there was some error in the judgment since some part of the counter claim was proved but not taken into account.

8. Being aggrieved by the said ruling the appellant filed this appeal and listed 16 grounds of appeal namely:

1. The learned magistrate erred in law and in fact for failing to hold that there was no discovery of an and important matter or evidence which was not within the defendant's knowledge and that there was no annexure attached to the defendant's application for review.

2. The learned magistrate erred in law and in fact for failing to hold that there was absolutely no mistake or error apparent on the face of the the record to warrant a review of the judgment.

3. The learned magistrate erred in law and in fact for failing to hold that there were no ambiguities and that the judgment sought to be reviewed was so clear and left no room for any review.

4. The learned magistrate erred in law and in fact for failing to hold that there were absolutely no sufficient reasons that were advanced to warrant a review of her own judgment.

5. The learned magistrate erred in law and in fact for failing to hold that the defendants application review was fundamentally defective and incompetent for violating mandatory provisions for the law.

6. The learned magistrate erred in law and in fact for failing to dismiss the defendant's application for review yet the judgment and decree sought to be reviewed was not extracted and annexed to the application

7. The learned magistrate erred in law and in fact for failing to consider the plaintiff's submissions and for blatantly disregarding the High Court and Court of appeal binding authorities governing review application and in particular Civil appeal No. 211 of 1996 HCCC No. 39 of 1995 among others.

8. The learned magistrate erred in law and in fact when she set aside the judgment and decree yet it is not what is envisaged under order 44 of the civil Procedure rules.

9. The learned magistrate erred in law and in fact when she delivered a ruling devoid of any legal.....and which was extremely biased and a deliberate attempt to assist the defendant.

10. The learned magistrate erred in law and in fact for granting orders which were null and void and which she had no jurisdiction to grant under order 44 of the Civil Procedure Rules.

11. The learned magistrate erred in law and in fact for failing to hold that the matter was extremely contested and had been fully canvassed during the trial and that the only recourse open to any aggrieved party was to lodge an appeal against the judgment and not to apply for a review.

12. The learned magistrate erred in law and in fact when she purported to sit in an appeal on her own judgment which is not permissible in law.

13. The learned magistrate erred in law and in fact for failing to hold that an issue which had been hotly contested and parties had called many witnesses cannot be reviewed by the same court which had adjudicated upon it.

14. The learned magistrate erred in law and in fact when she ordered the matter to start a fresh when there was no prayer to that effect.

15. The learned magistrate erred in law and in fact for failure to hold that invitations to review, vary or rescind her own judgment and decisions is contrary to the well settled principals.

16. The learned magistrate completely misdirected herself and failed to appreciate the law on review and arrived at a wrong decision and as a result there has been manifest misjustice.

9. Directions were given that this appeal be determined by way of written submissions and at the time of writing this judgment it is only the appellant who had filed his submissions.

SUBMISSIONS

10. It was submitted that the trial court erred in law and fact in failing to hold that there was no discovery of a new and important matter which was not within the respondents knowledge and that there was no error or mistake on the face of record to warrant review and that the trial court ought to have dismissed the application.

11. It was further submitted that the application was defective since the decree or order sought to be reviewed was not annexed to the application and that the trial court had no jurisdiction to sit on appeal on her own judgment.

12. In support of the submissions herein the appellant relied upon the following authorities.

1. NATIONAL BANK OF KENYA LTD vs NDUNGU NJAU NAIROBI CIVIL APPEAL NO. 211 OF 1996 “where the court held that a review may be granted whenever the court considered 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 an elaborate argument to be established. It will not be a ground for review that a different judge would 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....”

In the instance case the matter in dispute had been fully canvassed before the learned judge. He made a conscious decision in favour of the respondent. If he had reached a wrong conclusion of law it could be a good ground for appeal but not review. Otherwise we agree that the learned judge would be sitting in an appeal on his own judgment which is not permissible in law. An issue which has been hotly contested in this case can not be reviewed by the same court which had adjudicated upon it.”

13. He also relied upon **UHURU HIGWAY DEVELOPMENT LTD vs CENTRAL BANK OF KENYA & 2 OTHERS HCCC NO. 29 OF 1995 NAIROBI. On the issue of decree therein the court stated that**

“It is the duty of a party who wishes to appeal against or apply for review of a decree or order to move the court to draw up and issue a formal decree or order.”

14. It is therefore submitted that the order and ruling of the trial magistrate made on 10th March 2010 be set aside and substituted with an order dismissing the chamber summons date 24th December 2009.

ISSUES

15. From the submission herein the only issue for courts determination is whether the respondent had made a case for the grant of the order of review.

16. It should be noted that there are three grounds upon which a court can review its own order:

- i. Discovery of new evidence.***
- ii. Error on the face of record***
- iii. Just cause.***

17. In this case the ground which the court relied upon to review the decision is that she did not consider the evidence tendered on the counter-claim

18. This to my mind is not a ground for review as was held in the case of NYAMOGO & NYAMOGO ADVOCATES vs KOGO [2011]E.A. 173 at page 175 wherein the court of appeal held

'As was stated in the AIR commentaries on the code of civil procedure by Chitaley and ROD 4th edition volume 3 at page 3227 "a point which may be a good ground of appeal may not be a good ground for an application for review. Thus an erroneous view of evidence or of law is not a good ground for review though it may be a good ground for an appeal"

19. It is clear from the proceedings that there were no discovery of new and important evidence neither was there any error apparent on the face of the record or judgment.

20. The only issue advanced was that the trial court did not properly analyse the evidence presented on behalf of the respondent and as is stated herein above trial was not an issue for review but for appeal.

21. In the circumstances of the matters stated herein above it is clear that the magistrate fell into error and from that reason the appeal herein is allowed.

22. The order of the trial court on 10th March 2010 allowing an application for review is hereby set aside and substituted with an order of the court dismissing the said application with costs to the appellant. The appellant shall also have the cost of the appeal.

Dated and delivered at Nyeri this 23rd day of May 2013.

J. WAKIAGA

JUDGE

Court: Judgment is delivered in open court in the absence of the parties and their advocates.

J.WAKIAGA

JUDGE