REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL NO. 31 OF 2010

SAID MBWANA ABDI ….....APPELLANT

VERSUS

MUHAMBI KOJA ….....RESPONDENT

RULING

1. Before me is a Notice of Motion expressed to be brought under Section 80 and 3A of the Civil Procedure Act and filed on 25th June, 2012 seeking in prayer 1 that:

   "1. That this honorable court be pleased to review, vary and/or set aside the judgment of this court delivered on 8th June, 2012 allowing the appeal and substitute it with orders for the appeal to go for full hearing"

2. The applicant is the respondent in the appeal filed by Said Mbwana Abdi, the unsuccessful party in the Lower Court. His key ground is that there is an error apparent on the face of the record. In his affidavit the Respondent/Applicant states that directions in the present appeal were given on 21st June, 2011 and on 18th July, 2011 whereupon the matter was scheduled for ruling on 31st October, 2011 by which date the trial judge had been transferred.

3. He complains that later on 8th June, 2012 when the decision of the Judge was delivered, it was a judgment rather than a ruling under Section 79B of the Civil Procedure Act as to whether or not the appeal should be summarily dismissed or go to full hearing. That is the alleged error on the face of the record. He argues that no prejudice will be visited on the appellant/respondent if the judgment is "*reversed*" so that the appeal is heard on merits.

4. On 8th November, 2012 the parties agreed to dispose of the instant application by way of written submissions while the appellant/respondent was granted leave to file a replying affidavit. Only the applicant/respondent filed submissions. The appellant/respondent neither filed a replying affidavit nor submissions. The application is therefore unopposed. The applicant's submissions are in consonance with the depositions in the supporting affidavit.

5. Order 45 rule 1 (i) is in the following terms:

   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"

6. Not having been the trial judge during the appeal I have to rely on the record about which it is said there exists an error on the face of the record. An error on the face of the record was described in the case of **Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173.** The Court of Appeal held: (P. 174)

   "We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law states one in the face, and there could reasonably be no two pinions, a clear case of an error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

7. As I understand it, the applicant's complaint is that the trial judge, rather than deliver a ruling whether the appeal ought to be summarily rejected or to proceed to hearing instead delivered a judgment on the merits of the appeal as if the appeal had been heard. In this regard, it is useful to look at the record of proceedings herein. The memorandum preceding the proceedings of 21st June, 2011 show that the matter was "listed for directions on 21st June, 2011". On that date both counsel for the appellant and the respondent/applicant were present. Mr. Muinde addressed the court in the following terms:

   "There is no real issue to be determined by this ct (court) on appeal – we ask to file written subm (submissions)."

8. The rest of the record is as follows:

   "Mr. Kimani

   I agree.

   ORDER: The respt. (Respondent's) counsel to file and serve written sub (submissions) within 14 days from today. The appl (appellant's) counsel to file and serve written subm(submissions) within 14 days after service. Mention on 18/7/11."

On 18th July, 2011 the appellant was absent while the respondent applicant's counsel was represented by Mr. Tindika. The record is as follows:

"Mr. Tindika

The ct (court) has discretion under Sec. 79(B) to peruse the appeal and make a decision on whether to summarily dismiss the same and urge court to do so – reject the appeal.

Order – Jd (Judgment) on 31|10|11."

The word Jd is inserted above a cancellation of what appears to be the original word, namely ruling.

9. It would appear from these proceedings that the parties had not filed submissions as ordered on 21st June, 2011 and they are partly to blame for the ensuing confusion. But clearly, as at 18th July, 2011 the issue at hand was whether or not to reject the appeal summarily. Section 79(B) of the Civil Procedure Act states:

> ***"Before an appeal from a subordinate court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of the decree or order appealed against he may, notwithstanding Section 79(c), reject the appeal summarily."***

10. This provision is consistent with order 42 rule 11 of the Civil Procedure rules. Only after the court's refusal to reject the appeal summarily under Section 79B of the Civil Procedure Act are directions for hearing taken. In practice the direction anticipated by Order 42 rule 11 of the Civil Procedure Rules are given by the judge in the absence of the parties. However, but during directions as to the hearing of the appeal, the parties have to be present (implied by Order 42 rule 13 of the Civil Procedure Rules).

11. Hence it appears the notice issued before 21st June, 2011 was premature and erroneous as the appeal had on the face of it not been admitted. That in fact was the inquiry made by the respondent's advocate by his letter dated 17th December, 2010. The registry it would seem did not forward the appeal for admission/rejection by the judge but instead listed it for directions. It is difficult to tell whether the proceedings on 21st June 2011 were in respect of directions under Order 42 rule 11 or rule 13 of the Civil Procedure Rules.

12. However, the proceedings of 18th July, 2011 seem to indicate that the proceedings were conducted under Order 42 rule 11 of the Civil Procedure Rules for purposes of directions under Section 79B. The judgment of the court delivered on 8th June, 2012 at page 13 refers to these proceedings and its directions to dispose of the matter by way of written submissions (see page 12-13).

13. The fact that the judgment deals with the merits of the appeal means that the appeal had not been summarily rejected as urged on 18th July, 2011. And there is no record that directions for the hearing were given and the hearing itself conducted. In the circumstances of this case, it does appear that there is an error on the face of the record satisfying the definition in **Nyamogo & Nyamogo Advocates.**

14. In the decision of the Court of Appeal in the case of **National Bank of Kenya Ltd v Ndungu Njau, Civil Appeal No. 2011 of 1996(UR)** the law was stated thus:

> ***"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 an elaborate argument to be established. It will not be a sufficient ground of 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 the law cannot be a ground of review"***

I think there is an error on the face of the record that is self evident in this case and that requires correction so that justice can be done. It is unfortunate that the dutiful efforts of the trial judge in preparing the judgment despite her transfer should be dissipated in this manner.

15. In the circumstances I will grant the respondent/applicant's Notice of Motion by setting aside the judgment delivered on 8th June,2 012. And now consequently having considered the

memorandum of appeal filed herein, I do order that the appeal be admitted for hearing.

In terms of Order 42 rule 12 of the Civil Procedure Rules the Deputy Registrar is directed to notify the appellant accordingly so that the matter can be listed expeditiously for directions before hearing as provided under Order 42 rule 13 of the Civil Procedure Rules.

Costs will be in the cause.

Delivered and signed at Malindi this **17th** day of **May, 2013** in the presence of Miss Mwanzia holding brief for Mr. Mburu for appellant/respondent.

Court clerk – Evans

C. W. Meoli

JUDGE