

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 84 of 2006

WAMBUI NGATIA.....APPELLANT

Versus

LYDIA MUTHONI.....RESPONDENT

**(From original Ruling of the Principal Magistrate’s Court at Murang’a
in Civil Case No.14 of 1981 by KIMANI NDUNGU – PM)**

J U D G M E N T

This is an appeal from the ruling delivered on 17th August, 2006 in the Principal Magistrate’s Court at Murang’a in civil case number 14 of 1981 by A. Kimani Ndungu, the then learned Principal Magistrate. By that ruling, the learned Principal Magistrate dismissed the appellant’s application dated 30th September, 2005. In that application, the appellant had in the main sought orders that the proceedings in that suit from 29th November, 1984 to 1st November, 2000 be nullified and expunged from the record and that the judgment of the court delivered on 6th December, 2000 be reviewed and set aside on the grounds that there was an error apparent on record. The error being that judgment was delivered in the civil appeal number 14 of 1981 on 17th September, 1981. Once the said judgment was delivered, the court became functus officio. Any subsequent proceedings conducted in that file that led to a subsequent judgment delivered on 6th December, 2000 were a nullity hence the application for review.

The respondent’s take of the appellant’s application was that no grounds for review had been made out by the appellant, that the appellant had filed the application after inordinate and unexplained delay and finally that the appellant had not annexed the order and or decree sought to be reviewed.

The application was canvassed before A. Kimani Ndungu, P.M and in a ruling delivered on 17th August, 2000, he dismissed the said application. In dismissing the application the learned magistrate stated; “A review will lie if new matter is discovered which could not be within knowledge of a party even after exercise of due diligence, where there is a mistake or error apparent on the face of the record or for any other sufficient reason. There is no new matter that the applicant places before court, there is no error apparent on the face of the record as the court continued to retry a matter as earlier ordered and applied the Law of Succession Act as far as possible and there is no other sufficient reason advanced to warrant a review.

Indeed the applicant at some point had found it fit to appeal against the judgment in question. This was after a delay and the superior court denied her leave to appeal out of time. In her application this fact is cleverly concealed. Thanks to Mr. Gichuki, we learn of this fact. The judicial process is not a trial and error affair. One can safely state that the bringing of this application is an afterthought with the applicant trying her luck once again. This is an untenable position if the judicial process is to retain its integrity and sanctity.”

From the above ruling the appellant now comes to this court on first appeal setting out the following grounds of appeal:-

“1. THAT the learned magistrate erred in law and in fact in failing to find that there was an error apparent on the face of the record in the proceedings.

2. THAT the learned magistrate erred in law and in fact in failing to find that the court had failed to observe the express provisions of the Law of Succession Act.

3. THAT the learned magistrate erred in law and in fact in finding that the appellant herein was guilty of inordinate delay whereas there was no evidence to support the same.

4. THAT the learned magistrate erred in law and in fact in failing to find that the partes to the proceedings

could not confer jurisdiction to hear a succession cause in total disregard of the mandatory procedure of the Law of Succession Act.

5. THAT the learned magistrate erred in law and in fact in failing to find that an order for review will lie for any sufficient reason and that in the instant case there was sufficient reasons to warrant review.

6. THAT the learned magistrate erred in law and in fact in failing to direct his mind correctly and in considering extraneous matters and therefore exercised his discretion wrongly.

7. THAT the learned magistrate erred in law and in fact in considering matters that were not properly before court but which were urged by the respondent's counsel from the bar and therefore arrived at a wrong decision."

When the appeal came up for hearing before me parties agreed to canvass the same by way of written submissions. The written submissions were subsequently filed alongside cited authorities that I have carefully read and considered.

Perhaps a short synopsis of this dispute is in order. The genesis of the dispute between the parties is Kangema District Magistrate's court land succession case number 144 of 1979. This case was filed on 12th November, 1979 under the now repealed section 120 of the Registered Land Act. The estate, the subject of the proceedings aforesaid was for one, Waruhiu Munga, deceased. He was the husband of the respondent. The estate consisted of land parcel Loc.14/Kiru/174. In a judgment delivered on 31st October, 1980, the District Magistrate, CC Chebii, awarded ½ of the aforesaid land to the appellant whereas the other ½ went to the respondent. The respondent filed an appeal against the said judgment in the Resident Magistrate's Court at Murang'a as the law then permitted. On 17th September, 1981, M.L. Wannappa, RM allowed the appeal and set aside the judgment. He also ordered that "...this case is to be heard by the DM III Kiharu on a date suitable to him and parties..." However it would appear that before the case could be re-heard as aforesaid, the Law of Succession Act came into force and had the effect of repealing section 120 of the Registered Land Act. The District Magistrate's court too lost jurisdiction to hear Succession Causes as a result. In other words the District Magistrate's Court, Kiharu could not now conduct the retrial. The parties therefore approached the Resident Magistrate's Court, Murang'a. Pursuant thereto an order in these terms was made: "...The case to be retried before R.M. Murang'a as closely as possible in accordance with Cap 160 Laws of Kenya. However this will be deemed to be a petition for letters of administration and on the hearing date the objections shall be heard..." On 8th June, 1999, the hearing of the case eventually began before the Principal Magistrate. Judgment was thereafter delivered on 6th December, 2000, dividing the land equally between the three sons of the respondent and one son of the appellant. The appellant was apparently not happy with this decision and opted to pursue an appeal. On 2nd May, 2001, the appellant filed an application in this court seeking extension of time in order to file an appeal out of time. Such leave was duly granted. However she never filed the appeal in time. Instead she made yet a further application for extension of time to enable her file an appeal which application was this time around denied by Okwengu J on 24th November, 2005. In the meantime and as all this was going on, the appellant had simultaneously lodged the application dated 30th September, 2005 for review of the judgment dated 8th June, 1999 but that application was dismissed on 17th August, 2006 which then provoked this appeal.

The appellant having embarked on appellate process, could she again be heard on an application for review? The odds seem to be against such proposition. The appellant having embarked on the appellate process by filing an application and obtaining leave to file appeal out of time, could not again in the same breath embark on a review process. She had lost her right to apply for review. The court of appeal in the case of *Tanjali Investments Limited V EL Nasr Export & Import Company* (2004) eKLR had this to say on the issue;

"...But even more important is the fact that the appellant applied for a review after its efforts for lodging an appeal had come to nought." Indeed in *Kisya* case (supra) this court stated; "...The principal and the only ground of appeal lodged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of review. We accept this is a sound proposition of law..."

Having applied and obtained leave to appeal out of time, the appellant could not thereafter apply for review. It is instructive that the appellant had no response on this issue in her written submissions much as it was raised in the respondent's submissions that were served on her. I take it that indeed the appellant

had no answer to this issue of law that is now well settled.

The above notwithstanding, was there really an error that apparent on the face of the record as claimed by the appellant? I do not think so. As correctly pointed out by Mr. Gichuki, learned counsel for the respondent, it would appear that the error the appellant is alluding to is the fact that the magistrate tried the succession cause in the appeal file instead of asking the parties to pursue the issue under the Law of Succession Act and that the court was hearing the appeal as opposed to retrying the succession cause. These cannot possibly be errors on record if one considers the order made by J.A. Amendi, the then Resident Magistrate at Murang'a. That order was to the effect that;

"...The case to be retried before R.M. Murang'a as closely as possible in accordance with Cap 160 Laws of Kenya. However this will be deemed to be a petition for letters of administration and on the hearing date the objections shall be heard...."

This order was made in the presence of all parties and none raised any objection. The order is very specific and unambiguous. The magistrate did not order the retrial of the appeal. Rather he ordered the retrial of the case. The case was to be tried with particular regard to the provisions of the Law of Succession Act which had by then come into force. That being the case there was no need for parties to commence fresh proceedings under the Law of Succession Act. After all section 2(2) of the Law of Succession specifically provides that:

"...The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the time of death but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act...."

The succession cause herein had commenced in 1979 before the Law of Succession Act had been operationalised. However since the matter was concluded when the Law of Succession was in force, it could only proceed so far as possible in accordance with the same. No doubt the learned Magistrate had the above provision in mind when he made the order. I am unable to agree with the appellant that once judgment in civil appeal number 14 of 1981 was delivered on 17th September, 1981, the court became functus officio. That judgment was the subject of a successful appeal. The order on appeal was to remit the succession cause to be retried by DMIII Kiharu court. However before DMIII Kiharu court could embark on the retrial, the Law of Succession Act came into operation and the court's jurisdiction was ousted. The dispute therefore reverted to the Resident Magistrate court for hearing and determination. It is instructive that in all these proceedings the parties were represented by able advocates who did not at all raise any object to the goings on.

The cause was subsequently heard and determined. After judgment, the court issued a certificate of confirmation of grant on 18th February, 2002. By an application dated 4th November, 2002, the respondent sought to correct the cause number from CA 14 of 1981 to succession cause number 144 of 1979. When the application was called out for hearing, the appellant's advocate is recorded as saying that he was not opposing the application to correct the title of the case. Consequently the application was allowed. With the appellant's active participation in the proceedings after 17th September, 1981 without as much as raising a finger, how can she then claim that the court was functus officio. In my judgment, I do not discern at all any error on the face of the record just as the learned magistrate did. In any case it has been held in the case of *Mwihoko Housing Co. Ltd V Equity Building society* (2002) eKLR that; "It is trite law, and we reiterate, that a review may be granted whenever the court considers that it is necessary to correct a 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 another judge could have taken a different view of the matter. Nor can it be a 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 law cannot be a ground for review. See *Nairobi City Council Vs Thabiti Enterprises Ltd* (1995 – 98 2 EA 251 (CAK))

The appellant too in my view would still have lost the application on the basis of inordinate delay. The judgment sought to be reviewed and set aside was delivered on 6th December, 2000. The appellant filed the application for review on 30th September, 2005, a whole 5 years or so down the line. This period is inordinate. The application was brought under order XLIV rule 1 of the Civil Procedure Rules. Under the said rule such an application has to be made without unreasonable delay. The appellant waited for almost 5 years to bring her application. On the face of it therefore there is unreasonable delay. The explanation

proffered for the delay is that the appellant's previous advocates on record did not inform her of the position in law. That cannot in my view, be an explanation. After all ignorance of the law is not an excuse nor a defence. Without a good explanation, the delay was deemed by the learned magistrate and correctly so in my view to be inordinate. As stated in the case of Tanjl Investments Ltd (supra) "...a party seeking review must do so without unreasonable delay. Hence, on the issue of time taken to file application for delay (sic) the appellant would not have succeeded. Its application for review was brought after a very long and unexplained delay..."

The same situation obtains here.

In view of the forgoing, I am satisfied that the learned magistrate was entitled to dismiss the appellant's application. Consequently, this appeal must fail and I order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE