



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Appeal 3 of 1999

ISAAC WASWA..... APPELLANT

VRS

JAWAHIR DUALE..... RESPONDENT

(From Original BGM SPM CC NO. 957 of 1995)

JUDGMENT

This appeal arises out of an order of the Senior Principal Magistrate Mr. I. Indeche dated 8.1.1999 in Civil Suit No.957 of 1995. Clearly, this is a very old matter which appears to be one of those where litigation never seems to come to end. The same was heard by Mr. Indeche on 16.2.1996. That hearing date had been taken by both parties at the Civil Registry on 29.1.1996. When it came up for hearing on 16.2.1996, counsel for the defendant applied for an adjournment saying that he was not aware of that date. The learned trial magistrate refused to allow the application for adjournment and also rejected Mr. Khakula's application to withdraw formerly from appearing for the defendant. Mr. Khakula therefore remained on record and was actually present when the case proceeded. The plaintiff testified but counsel for the defendant did not cross-examine him. The plaintiff closed his case and the matter was reserved for judgment. The said judgment was delivered on 23.2.96. That judgment was not appealed against. Instead, the defendant through another counsel filed an application for review of the same asking that it be set aside. The learned trial magistrate after hearing that application found it without merit and proceeded to dismiss the same with costs. That is the ruling which gave rise to this appeal. The appellant is asking this court to set aside the orders of the subordinate court which were given through that ruling. He relies on the following grounds as per his Memorandum of appeal.

1. *The learned trial magistrate erred in law and fact by failing to adequately address the legal points raised in the application before him.*
2. *The learned trial magistrate erred in law and fact by holding that the appellant was guilty of laches.*
3. *The learned trial magistrate erred in law and fact by holding that the matters raised in the application were not new when he had deliberately shut out the appellant from the proceedings.*
4. *The learned trial magistrate erred in law and fact by introducing matters that were not relevant to the application.*
5. *The learned trial magistrate erred in law and fact divesting himself of the unfettered discretion to review a judgment.*

The appeal was strongly opposed by Mr. Ocharo for the respondent herein. I must thank both counsel herein for their well preparedness and for the authorities they cited. I have read them and been duly informed by the same. Without delving into each and every submission that was made, I believe that as a starting point, it is important to clearly set out requirements which need to be met before an application for review of a ruling or judgment can be allowed. Any aggrieved party seeking a review of a decree of the court must establish the following:

- a) *That since the passing of the Ruling/Judgment in question, he has discovered 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 the decree was passed or the order made.*
- b) *That there was in the said decree/ruling an error or mistake which was apparent on the face of the record. Or*
- c) *For any sufficient reason.*

This sufficient reason must in my view however be read *ejus dem generis* with (a) & (b).

The application must also be brought to court without undue delay. The law also enjoins an applicant to sufficiently prove any of the grounds he is relying on. If he is relying on discovery of new material, he must prove that such material could not have been discovered even with due diligence. If it is an error on the face of the record, such an error must be one that “looks you in the face i.e it must be self evident and it should not require an elaborate argument to be established. It should also be emphasized that as held by the Court of appeal in “NATIONAL BANK OF KENYA -VRS- NDUNGU NJAU (Civil Appeal No.211 of 1996) that;

“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 of review.”

From the grounds of appeal cited, and the oral submission by counsel for the appellant, it is clear that he is challenging the ruling of the learned trial magistrate on the basis that he misapprehended the law and that he failed to interpret some of the documents presented to him properly. In his address to court, he submitted extensively on the ownership of the plot in question, the letter of allotment, when the lease was issued, consent to transfer etc. which issues he said were not properly considered and construed by the learned trial magistrate. To me, these do not amount to an error apparent on the face of the record. They should have formed some substantive grounds of appeal. The Court of Appeal of Kenya in “NYAMOGO and NYAMOGO ADVOCATES -V- KOGO [EALR] 2001) CA held that:

“Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

They quoted with approval the following passage from AIR commentaries on the code of Civil Procedure by CHITALEY AND RAO (LTD) VOL.3 AT PG 3227;

“ A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or law is no ground for a review though it may be a good ground for an appeal.”

I agree fully with the above quotation. In this case, the appellant has not claimed any discovery of new material. He is relying on what he thinks are errors on the face of the record. They were “*considered findings*” of the learned trial magistrate. If he made errors in his interpretation of the law or the contents of the documents before him, then the defendant/appellant’s only recourse was to file an appeal and challenge those findings. He cannot purport to do so on review. Indeed according to Mr. Ocharo for the respondent, counsel for the appellant was being less than candid in not disclosing to this court that indeed they had filed an application to file an appeal out of time and the same was denied. It is important

for parties who seek justice to come to court with clean hands.

I would also agree with the learned trial magistrate in his ruling that the appellant herein took inordinately long (2 years) to move the court for review of the said ruling. He was justified in arriving at that finding. Without even saying more, I can conclusively say that from whichever angle I look at this appeal, the same is to say the least "*hopeless*". It is just a fickle attempt by the appellant to grasp at the straws and refuse to let go of a case which he justifiably lost. I do not want to even delve deeper into the fact that the matter had already been handled by the High Court in Kakamega where this appellant almost lost. Suffice it to say that I find this appeal devoid of merit and the same calls for dismissal. I dismiss the same with costs to the respondent.

W. KARANJA

JUDGE

DELIVERED, Dated and Signed at Bungoma this 12th day of March, 2008

in the presence of Mr. Makokha for appellant and Mr. Ocharo for respondent.