



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 54 of 1999

SAMUEL MUGAMBI LUKA APPELLANT

VERSUS

JESSIE MUKORUGURU RESPONDENT

(An Appeal from a Ruling of Mr. P.M. Ndung'u, SRM Meru

delivered on 13th April 1999)

JUDGMENT

This is an appeal from the ruling of the lower court, P.M. Ndungu, SRM dated 13.4.1999 in which he disallowed the appellant's application for review of a decree made on 12th July 1988.

The brief background to this appeal is that the respondent instituted a suit, PMCC No. 176 of 1985 in the court below against the appellant for orders that the latter transfers to him ½ acre of land from NYAKI/MURATHANKARI/676 which the respondent had purchased from the appellant.

On 22nd November 1985 when the matter came up for hearing the trial magistrate referred it to arbitration by elders under the chairmanship of the District Officer (D.O.), North Imenti. The award was subsequently filed in court, read on 31st July 1987 and judgment entered on 14th August 1987 in terms of the award.

The import of the judgment was that the appellant was ordered to transfer ½ acre of NYAKI/MULATHANKARI/884 and not 676 which was the subject matter in the plaint.

By application dated 15th April 1992 the respondent came to court to seek a review of the very decree on the grounds that during the pendency of the matter the appellant had subdivided parcel No. 884 into NYAKI/MURATHANKARI/1423 and 1424 and transferred the former to one Joseph Meeme James, retaining No. 1424. The respondent sought, therefore that the ½ acre be excised from No. 1424. That application was allowed by Mary Mugo, Principal Magistrate (as she then was) on 28th May 1992.

I have seen in the original file that the appellant preferred an appeal, HCC Appeal No. 64 of 1992 against that decision. The appeal was withdrawn on 17th July 1996. On 17th November 1998 the appellant brought the application to which this appeal relates.

It was by way of a Notice of Motion for orders of:-

- (i) Inhibition of land No. NYAKI/MURATHANKARI/224, and
- (ii) Review of the judgment and decree of 12th July 1988.

The application was premised on the grounds that the decree was made pursuant to a referral which referral was made in contravention of Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules; that there was an error of law apparent on the face of the record; and that there was sufficient reason to review the judgment/decree. In dismissing the application P.M. Ndung'u, then S.R.M., stated as follows with regard to the above grounds:-

“With respect, the court finds that no consent from either of the parties was required. All that was required for the case to be filed in court and since that was done indeed the court was obliged to refer it for arbitration has indeed been approved in this case (sic).”

He went further to dismiss the argument that the parcel of land awarded to the respondent was not the one pleaded in the plaint. He also held that there was inordinate delay in making the application. This appeal challenges that decision on eight grounds argued together. Those grounds can further be condensed as follows:-

That the learned magistrate erred

- (i) in failing to allow the application and order a review of the decree made on 12th July 1988 and to order retrial of the case.
- (ii) in failing to find that the parcel of land awarded to the respondent in the decree was not the subject matter of the suit.
- (iii) in failing to find that the reference to arbitration was against the law
- (iv) in finding that there was delay in bringing the application.

The application giving rise to the ruling being challenged in this appeal was brought pursuant to section 3A of the Civil Procedure Act and Order 44 rules 1 and 6 of the Civil Procedure Rules. The substantive law is section 80 of the Civil Procedure Act which permits any person aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or a decree or order from which no appeal is allowed, to apply for review of the same.

In terms of Order 44 Rule 1 of the Civil Procedure Rules a review of a decree or order may be granted only on the following grounds:-

- (i) That there is discovery of a new and important matter or evidence, which was not within the knowledge of the person applying at the time the decree was passed or order made. The applicant must demonstrate that he exercised due diligence, or
- (ii) That there is a mistake or error apparent on the face of the record, or
- (iii) That there is some other sufficient reason
- (iv) That the application for review has been brought without unreasonable delay.

Of course the other grounds set out in section 80 aforesaid regarding appeal must also be considered. Clearly, the appellant was aggrieved by the decree of 12th July 1988.

I have perused this file and even HCC Appeal No. 64 of 1992 and can confirm that no appeal was preferred against that decree. The appellant was entitled to seek a review. The only question is whether

he complied with Order 44 Rule 1. The appellant relied on the grounds that there was a mistake or error apparent on the face of the record and “*for any other sufficient ground*”.

The alleged mistakes or errors are that land awarded to the respondent is not the one claimed in the plaint; that the decree was based on an award of a reference to a tribunal against the law.

These grounds were canvassed by learned counsel for the appellant. He cited the case of **Girado Otieno Mahaja V. Khafulu Khutwalo and Domas Wanyande** (1982-88) IKLR 265. I hasten to observe that that authority has no application to this appeal. Regarding delay counsel submitted that there is no time limit for bringing an application for review and that all an applicant is required to do is to demonstrate that the application was brought expeditiously.

Learned counsel for the respondent submitted that the award could not be challenged on appeal or by an application to set aside. That at the time the application for review was brought by the appellant the decree had been reviewed by an order issued by Mrs. Mugo. The foregoing constitute the history of this appeal, the law and submissions by counsel.

I will start with the issue of time. A person aggrieved by a decision must move with dispatch to challenge the decision either by way of appeal, or application to set the decision aside or even review. Whereas there is no time limit for bringing an application for review such application must be brought without unreasonable delay. Whether or not an application has been brought without unreasonable delay is a question of fact depending on the circumstances of each case.

In this appeal the decree was passed on 12th July 1988. There were, of course, many applications arising from that decree. The only application for review before the one under consideration was brought by the respondent in which Mrs. Mugo, the then Principal Magistrate sanctioned the parcels of land in the decree. The next application for review is the one in this appeal. It was brought on 17th November 1998, ten years after the passing of the decree. I find no justification for such inordinate delay and equity does not help the indolent.

Is there a mistake or error apparent on the face of the record? Rule 2 of Order 44 gives a hint as to the kind of mistake or error that is envisaged. They include clerical or arithmetical mistakes or errors. The mistake or error must be apparent on the face of the record.

A distinction must be drawn between matters that are fit for review and those that must go to appeal. That distinction was succinctly stated in the Uganda case of **Belinda V. Kangwama & Another** (1963) as follows:-

“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 not a ground for review – though it may be a good ground for an appeal.”

Similarly, **Mulla on the Indian Code of Civil Procedure** 13th Edition Page 1672 states that:-

“A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simplicitor and an error apparent on the face of the record may sometimes be thin. It can be said of an error that is apparent on the face of the record when it is obvious and self-evidence and does not require an elaborate argument to be established.”

In view of the foregoing, it is my considered view that the two grounds advanced by the appellant in support of his contention that there was a mistake or error on the face of the record is without merit.

Indeed, those grounds challenge the trial magistrate’s appreciation of the evidence and application of the law. That can only be challenged on appeal. Similarly, I find no other sufficient ground in the application that was rejected that would have compelled the learned trial magistrate to review the decree

in question.

This appeal, it follows, must fail. It is dismissed. I award costs of this appeal and in the lower court to the respondent.

Dated and delivered at Meru this 21st day of October 2008.

W. OUKO

JUDGE