Ikakor & 4 others v Amila (Environment and Land Appeal 6 of 2019)
[2022] KEELC 14770 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14770 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 6 OF 2019

BN OLAO, J

NOVEMBER 17, 2022

BETWEEN

RICHARD MAJUNE IKAKOR ..... 1ST APPELLANT

AYUB IKAKORI ..... 2ND APPELLANT

ISAAC IKAKORI ..... 3RD APPELLANT

JUSTINE IKAKORI ..... 4TH APPELLANT

KIPSAGE OLANDO ..... 5TH APPELLANT

AND

BENARD OJILONG AMILA ..... RESPONDENT

RULING

1. This ruling was due on October 18, 2022. However, following my transfer to Busia ELC on October 3, 2022 and the attendant disruptions, it was not possible to deliver it on that day.

2. The delay is regretted but was due to unavoidable circumstances.

3. Richard Majune Ikakur, Ayub Ikakori, Isaac Ikakori, Justine Ikakori and Kipsale Olando (the Appellants) were aggrieved by the judgment of Hon DO Onyango (senior Principal Magistrate) delivered on February 28, 2019 in Kimilili Spm Ccc No 47 of 2011 and promptly held that Memorandum of Appeal on March 26, 2019. That Memorandum of Appeal was however only signed by Ayub Ikakori, Isaac Ikakor And Kipsage Olando (the 2nd, 3rd and 5th Appellants).

   It is not clear why it took a whole 2 years to submit the appeal before me for perusal and directions. However, when the record was placed before me for directions on February 22, 2021, I rejected it summarily under Section 79B of the *Civil Procedure Act*.

4. Further aggrieved by the Order summarily rejecting their appeal Ayub Ikakor And Isaac Ikakor (the 2nd and 3rd Applicants respectively), have moved to this Court citing the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* and by their Notice of Motion dated November 25, 2021 seek the following Orders:

    1. That the Order herein dated February 22, 2021 be reviewed and set aside.

    2. That the Memorandum of Appeal dated March 25, 2019 be reinstated.

5. The application is premised on the grounds set out therein and is supported by the affidavit of Ayub Ikakali dated November 25, 2021.

6. The gravamen of the application is that the suit in the subordinate Court involved the ownership of the land parcels No Elgon/Kaptama/331 and 333 which was ancestral land. That the subordinate Court entered judgment against the Applicants and so they filed their appeal in person. After waiting for a long time to have the appeal heard, they instructed their counsel now on record to take it up and it was then that they discovered that the appeal had been summarily rejected by this Court. Horrified at that discovery, they instructed their Counsel to apply for a review of the Order summarily rejecting their appeal. That in summarily rejecting their appeal, this Court did not have all the relevant details to support that Order which was not only drastic but has also caused them injustice.

7. The application is opposed and Benard Ojilong Amila (the Respondent) filed a replying affidavit dated July 29, 2022 in which he deponed, inter alia, that the application is incompetent, fatally defective and is only meant to delay the recovery of his costs. That the Applicants failed to prosecute their appeal and there are no reasons to warrant the Orders of review sought. That this Court being satisfied that the appeal lacked merit summarily rejected it under Section 79B of the *Civil Procedure Act* and this application has been overtaken by events and should be dismissed for being incompetent and fatally defective.

8. When the application was placed before me on July 5, 2022, I directed that it be canvassed by way of written submissions. Those were subsequently filed both by Mr JS Khakula instructed by the firm of JS Khakula & Company Advocates for the Applicants and by the Respondent acting in person.

9. I have considered the application, the rival affidavits and the submissions filed.

10. Before I delve into the merits or otherwise of the application, I need to address one issue which, although not raised by the Respondent, needs to be considered.

11. For purposes of this application, the Applicants are Ayub Ikakor And Isaac Ikakor (the 2nd and 3rd Applicants respectively). However, the supporting affidavit dated November 25, 2021 is signed by one Ayub Ikakali who describes himself as the 2nd Applicant. It is not clear whether Ayub Ikakor and Ayub Ikakali refer to the same person. However, since the identity of the 2nd Applicant has not been questioned. I will say no more on that discrepancy.

12. In his submissions in support of this application, Counsel for the Applicants has stated as follows:

> " Summary rejection of an appeal from a subordinate Court is provided for by Section 79B of the *Civil Procedure Act*. Courts have, however, held in the case of Mashere v Walusa 1987 KLR 854 that the power to apply this provision of the law must be used sparingly used (sic) and only in the clearest of cases. An earlier decision of that Court in Hamzaali Alibhai And 2 Others V Walusalaamirali T Sulemanji And Others – Mombasa Civil Appeal No 2 of

1985 also held that such summary rejection denies the appellant the satisfaction of having received a hearing by the Court."

13. Counsel for the Applicants then goes on to add as follows:

> " In addition to these authorities, Order 42 Rule 2 of the Civil Procedure Rules 2010 provides that summary rejection may be applied only when a certified copy of the decree appealed against is or has been filed with the Memorandum of Appeal"

14. I have read the authorities citied by Counsel for the Applicants and it is correct that in the case of *Mashere V Walusala* (supra) the Court of Appeal stated as follows with regard to the power of this Court to reject an appeal summarily:

> " But the essence of the observation, is that the power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparingly one can indeed only refer to a rejection in the clearest cases of fact or law. So that spectrum is narrow."

However, there is no doubt that this Court has the power to summarily reject an appeal. Section 79B of the *Civil Procedure Act* states:

> " Before an appeal from a subordinate Court to the High 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 a decree or Order appealed against he may, notwithstanding Section 79C, reject the appeal summarily."

15. Therefore, while it is true that the power to summarily reject an appeal is a power to be exercised "sparingly", it is nonetheless a power donated to this Court and which must be invoked in appropriate cases. To say that a power should be exercised "sparingly" is obviously not a caveat against the exercise of such power. In the case of *Hamzaali By Alibhai & 2 Others V Amirali R Sulemanji* (*supra*) cited by Counsel for the Applicants, the Court of Appeal noted that "the memorandum of appeal to the High Court drafted by an advocate consisted of six grounds of appeal each one of which contained arguable material, including legal issues". The Court went on to add that:

> " The High Court should be slow to reject summarily an appeal thus presented."

The same cannot be said of the Memorandum of Appeal filed herein by the Applicants acting in person. It raised the following 4 grounds:

1. That the decision of the trial Magistrate was against the preponderance of the evidence adduced before him.
2. That the trial magistrate erred in law and fact in allowing he plaintiff's claim without properly examining the evidence on record.
3. That the trial magistrate failed to find that the proceedings were a mistrial.
4. That the trial magistrate erred in law in failing to find that the plaintiff had no locus standi to file the suit.

Having perused the record of the proceedings and the certified judgment delivered by the trial Court on February 28, 2019, I was satisfied that the appeal was for rejection summarily. To begin with, the locus standi of the Respondent to file the suit in the subordinate Court seeking to evict the Applicants from the land parcel No Elgon/Kaptama/333, and which was

the only Order granted by that Court, could not be faulted since the Court found at page 47 of the judgment that the Respondent was "the registered proprietor of parcel No Elgon/KAptama/333" as he had produced a title dead of the same as exhibit." The record is also clear that the 2nd and 3rd Applicants did not even file any statement to rebut the Respondent's claim to the said parcel of land. Indeed the Respondent was quite magnanimous in proceeding with the trial in the absence of such statements. In the circumstances, the Applicants could not be heard to complain, as they did in paragraphs 1,2 and 3 of their Memorandum of Appeal, that the decision of the trial magistrate was "against the preponderance of the evidence adduced or that the trial Court" erred in law and in fact in allowing the plaintiff's claim without properly examining all the evidence on record."

16. Counsel for the Applicants, citing Order 42 Rule 2 of the *Civil Procedure Rules*, has also made the following submissions in support of the claim that the appeal was not ripe for summary rejection:

> "It is our view that an appeal is not just a memorandum of appeal. It is a memorandum of appeal with a certified copy of the decree appealed from. In this case perusal by the Court was done before such decree was been (sic) filed. The appeal was not ripe for perusal."

Order 42 Rule 2 of the *Civil Procedure Rules* provides that:

> "Where no certified copy of the decree or Order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the Court may order, and the Court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed."-

Counsel for the Applicants has also made the following submission.

> "A record of appeal comprises pleadings, witness statements, documents, proceedings and judgement compiled and filed by the appellant. The record is a vital step in the presentation of an appeal. No such record had been filed yet. The appellant still had a lee way under the provision of Order 42 Rule 3 (1) to amend his memorandum of appeal before the Court gives directions under Order 42 Rule 13. In our opinion, the summary rejection of the appeal herein was made prematurely. The appellant still had time to present sufficient documentation and to amend his memorandum of appeal. We humbly pray that the summary rejection Order be reviewed and the appeal reinstated"

17. By the time this Court made the Order summarily rejecting the appeal, the formal Decree of the subordinate Court was of course not yet extracted and filed by the Applicants. However, that was not a bar to the Order of summary rejection of the appeal because there was a record of the judgment sought to be appealed and the same was duly certified. That certified judgment was sufficient for purposes of filing an appeal. This is because, Section 2 of the *Civil Procedure Act* defines a Decree in the following terms:

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91, but does not include-
>
> a. any adjudication from which an appeal lies as an appeal from an order; or

b. any order for dismissal for default.

Provided that, for purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding that fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable at being drawn up" "Emphasis added."

Counsel for the Applicants cannot therefore be correct when he submits that this Court could only have properly made the Order for summarily rejection of the appeal after perusing the record of appeal. My understanding of the law is that for purposes of summary rejection of the appeal, the memorandum of appeal and the judgment which was available in this case went sufficient to justify the orders made. Indeed it is only after the appeal has been admitted to hearing that the Appellant will prepare the full record of appeal including the memorandum of appeal, pleadings judgment order decrees etc as provided under Order 42 Rule 13 of the *Civil Procedure Rules*. Therefore, the fact that no formal decree had been extracted by the time this Court made the orders summarily rejecting the appeal on February 22, 2021 did not take away the jurisdiction of this Court to make the Orders sought to be reviewed. Indeed that copy of the certified judgment would also suffice for purposes of admitting the appeal for hearing. It cannot be a ground for complaint that no formal decree was extracted before any appeal is rejected or admitted. This is because, a decree is essentially a summarized vision of the judgment simply highlighting what remedies the parties sought from the Court and what Orders were finally made by the Court in resolving the dispute before it.

18. For that reason alone, this application is for dismissal.

19. Secondly and most importantly, what the Applicants seek is a review of this Court's Order dated February 22, 2022 summarily rejecting their appeal and to have it reinstated. The power to review a decree or Order is donated by Section 80 of the *Civil Procedure Act* which states:

80: "Any person who considers himself aggrieved –

a. by a decree or order form which an appeal is allowed by this Act, but from which no appeal has been preferred, or

b. by a decree or order form which no appeal is allowed by this Act, May apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such orders therefrom as it thinks fit."

Order 45 Rule 1 (1) of the *Civil Procedure Rules* provides for the procedure in review applications in the following terms:

45 (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 form 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 judgement tot he Court which passed the decree or made the order without unreasonable delay." Emphasis added.

It is therefore clear that this Court's power to review it's orders is limited to the following grounds:

1. Discovery of new and important matter or evidence which was not within the knowledge of the Applicant and could not be produced at the time the decree was passed or the order made.

2. On account of some mistake or error apparent on the face of the record.

3. For any other sufficient reason

4. Finally, the application must be made without unreasonable delay.

20. The Applicants have not informed this Court when they became aware about the summary rejection of their appeal. The record shows however, that following the order of February 22, 2021 rejecting their appeal, the Deputy Registrar of this Court extracted the order on March 9, 2021. The Applicants must have become aware about this Court's order soon thereafter as they have not told this Court exactly when their counsel perused the Court file and became aware about the order rejecting their appeal summarily. Even assuming that they became aware about the order in April 2021, it should not have taken them up to December 15, 2021 to file their Notice of Motion dated November 25, 2021 seeking a review of the said order. I find that delay of 8 months to be unreasonable and it has also not been explained. As was held in *Francis Origo & Another V Jacob Kumali Mungala* CA Civil Appeal No 149 of 2001 [2006 2KLR 307]:

> "In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay". Emphasis added.

The delay of 8 months clearly disentitles the Applicants to the remedy of review. And on that basis alone the application must be dismissed.

21. The Applicants have further not cited in their Notice of Motion any new and important matter or evidence nor any mistake or error apparent on the face of the record or any other sufficient reason to warrant the grant of the order of review sought. In his submissions, their counsel appears to suggest that this Court misapprehended the law as provided under Section 79B of the *Civil Procedure Act* as well as Order 42 of the *Civil Procedure Rule* when it summarily rejected the Applicants' appeal. However, it has been held that failure to apply the law properly cannot be a ground for review. In *National Bank Of Kenya Ltd V Ndungu Njau* CA Civil Appeal No 211 of 1996 [1997 eKLR], the Court held that:

> "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 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 ground for review."

In the case of *Pancras T Swai V Kenya Breweries Ltd* 2014 ekLR, the Court of Appeal cited with approval the holding of Bennett J In Absi *Belinda V Fredrick Kangwamu & Another* 1963 E.A 557 where the judge held that:

> " a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."

The Court in *Pancras T Swai V Kenya Breweries Ltd* (*supra*) went on to add that:

> " It seems clear to us that the appellant, in basing his review application on the failure on the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are *functus officio* and have no appellate jurisdiction."

22. As already stated above, much of Mr Khakula's submissions in support of the Applicants case hinge on the claim that this Court misapprehended the law on summary rejection of their appeal and therefore arrived at a wrong decision which ought to be reviewed. Even assuming that there was a misapprehension of the law by this court, that is a matter which should have formed the basis of the averments in the supporting affidavit. That is because, submissions are not evidence upon which the Court can rely to make a decision. In any case, this Court has already made a finding that there was no error or mistake on the face of the record and neither am I persuaded that there was any error of law. And as is now clear from the cases cited above, any error of law cannot be a ground for review. Rather, it can only be a ground of appeal.

23. The up-shot of all the above is that the Notice of Motion dated November 25, 2021 is devoid of merit. It is accordingly dismissed with costs to the Respondent.

B.N. OLAO

JUDGE

17TH NOVEMBER 2022

RULING DATED AND SIGNED AT BUSIA ON THIS 17TH DAY OF NOVEMBER 2022.

The same is delivered by way of electronic mail on this 17th day of November 2022 in keeping with the COVID 19 pandemic guidelines as was advised to the parties on 5th January 2022 when directions were taken.

B.N. OLAO

JUDGE

17TH NOVEMBER 2022