REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1661 OF 1980

MUTHONI NDUATI ……………………………………… PLAINTIFF

VERSUS

WANYOIKE KAMAU & 5 OTHERS ………………… DEFENDANT

R U L I N G

By a Notice of Motion dated 26th April 1996, the Defendants are seeking an Order to review the judgment which was delivered by Nambuye J. on 30/7/92. The said application was brought pursuant to the provisions of Order XLI of the Civil Procedure Rules.

It is to be noted that the provisions of Order XLI deal with the issue of Appeals only. An application for review could only properly be brought under Order XLIV of the Civil Procedure Rules. I must therefore ask myself if the failure by the applicant to cite the correct provisions of the rules would by itself seal the fate of the said application. And the answer to that question is that the citation of the wrong provisions of the law is not necessarily fatal in itself. In the case of Gatu V. Muriuki [1986] KLR 211 at 212, Apaloo J.A. held as follows:

> "This application could only properly be brought under Order 9 (8) of the High Court Civil Procedure Rules. However, when the applicant brought the application, he erroneously put down as the authority on which he sought his relief Order XLIV Rule 122 and Order VI Rule 3. They were quite wrong. The learned judge seems to have laid great stress on the fact that although it was a competent application, the wrong procedural warrant was cited for it".

When passing his verdict on the judge's decision to dismiss the application, Apaloo J.A. made the following pertinent conclusion;

> "Although I am not now concerned with the merits, I cannot shut my eyes to the fact that the main ground on which the learned judge declined to exercise his discretion to set aside the judgment of dismissal was that in bringing the motion to relist, the applicant, in error, quoted the wrong order. That seems to me hardly a sound basis for dismissing the motion".

I therefore find that the citation of the wrong procedural rule is not by itself fatal to the Defendants' application.

I do now proceed to give consideration to the merits of the application. By the said application, the Defendants are asking that the Judgment of Nambuye J. be reviewed as it otherwise has an error apparent on the face of the record. The gist of the said error is that whilst the suit property as 30 acres in area, the Trial Judge only purported to give to the successful Defendants 20 acres of the same. The Defendants contend that upon the dismissal of the Plaintiff's claim, the court ought to have granted the whole suit

property to the Defendants.

I do remind myself that I am not sitting on appeal over Nambuye J. It is not the function of this court to assess the judgment to ascertain whether or not it is right. ‘The only role that I am called upon to perform in the present application is to decide whether or not there was an error apparent on the face of the record.

I understand the Defendants to be saying that the dismissal of the Plaintiff’s claim is only consistent with the depriving them of the suit property in toto. Conversely, the success of the Defendants’ counter-claim would only be consistent with the award of all the 30 acres to the said Defendants, so say the Defendants.

In order to analyse the application I first need to set out the salient features of its history. By the Plaint filed in court on 18/6/80 the Plaintiff sought the eviction of the Defendants from the suit property. The Plaintiff also sought a permanent injunction to restrain the Defendants from trespassing on the said property. Thirdly, the Plaintiff prayed for General Damages, costs and interest.

In response to the claims in the Plaint, the Defendants denied the assertions that the suit property belonged to the Plaintiff. The Defendants also filed a counter-claim asserting that the Plaintiff held the property in trust for their late father, and furthermore that they had themselves acquired title thereto, by virtue of adverse possession.

Having given due consideration to the Plaint, Defence and counterclaim as pleaded, I find that the dismissal of the Plaint would not automatically give to the Defendants the whole suit property. The dismissal of the plaintiff’s claims for the eviction of the Defendants and those of General Damages and a permanent injunction would not necessarily give the whole property to the Defendants. I hold the view that if the court had made the finding that the Defendants had proved their counter claim in full that would have meant that the whole suit property ought to have been awarded to them. But I have not traced any such expressly exclusive finding in favour of the Defendants. What I did find from the record are findings by the trial judge that:

> “the plaintiff and deceased purchased the land jointly. As to the proportion of sharing, he court rejected exhibit 2 as there were no signatures. The plaintiff produced no witnesses to prove purchase although he said they were all dead. The explanation could be right as the purchases were made long time ago. The Defence produced D1 where details of purchases were made. However, these were based on conversation between the deceased and DW1, the 6th defendant. The entries are not signed.
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> The defence called two witnesses who testified that they witnessed the deceased purchase pieces of land one sold him on fragment but cannot tell the acreage. Another witnessed the sale of 8 pieces of fragments but cannot also tell us the acreage of the pieces and in the premises the shares of each will have to be determined through other factors relating to user”.

Thereafter the Trial Judge did an assessment, and apportioned the suit land between the Plaintiff and Defendants on the ratio of 10:20 As far as I can see, there are 2 limbs within the above-cited findings by the trial judge, namely:-

> (i) that the Plaintiff and the deceased purchased the land jointly, and
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> (ii) that neither the Plaintiff nor the Defendants adduced conclusive evidence to prove the acreage that each of them was entitled to.

Having arrived at the said conclusions, the trial judge apportioned the suit property between the 2 protagonists. The question which then arises is whether the decision to apportion the property to the 2 parties was an error on the face of the record.

The Defendants say that the decision by the judge to apportion the property was an error apparent on the

face of the record. It is for that reason that the Defendants have brought this application for review. And in support of their application the Defendants place reliance upon the decision by the Court of Appeal in Civil Appeal No 161 of 1991 Abdul Shakoor Sheikh Vs Abdul Najib Sheikh and 2 others. In that case, the superior court had dealt with an issue which was not properly before it, as it had not been pleaded in the plaint. The judge was criticised by the appellant for having made a gross error by granting a relief which had not been sought. The advocate for the respondent, in the said appeal, graciously conceded that the order went beyond the pleadings in the case. In its judgment the court of Appeal held that:

> "as a general rule, therefore, a plaintiff is not entitled to reliefs which he has not specified

in his statement of claim. Pleadings play a very pivotal role in litigation. As stated in Bullen & Leake [12th edition] at page 3 under the rubric Nature of Pleadings:

> "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial".

My reading of the foregoing decision is that if a trial court deals with an issue which is not properly before it, that would be wrong. Thus if the question of apportionment was not pleaded, and yet the trial court decided to have the suit property apportioned, would the court be deemed to have acted wrongly? In the Civil Application No. NAI 2550 of 2001 Benedicta Bome & Another V. Michelle Stuard: the Court of Appeal had occasion to deal with a similar situation.

This is how they addressed the issue:

> "It is common ground that neither the applicants nor the respondent wants partition of the suit property. It was also common ground that the parties are not in agreement concerning the value of the property. It is therefore arguable whether, in the circumstances, the trial judge could properly order partition.
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> Besides, partition having not been pleaded or canvassed by the parties, whether it was open to the trial judge to deal with the issue of partition.
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> Moreover, ordinarily issues for determination in a suit flow from the pleadings. There are instances as in the case of Charles C. Sande V KCC Ltd Civil Appeal No. 154 of 1992 (unreported), Odd Jobs V Mubia [1970] CA 476 where it was held that in certain cases an unpleaded issue may form the basis of determining a dispute between the parties.
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> Whether or not this was an approprite case in that regard is an arguable point".

In the light of this decision by the Court of Appeal, it is clear that decision by Nambuye J. was not necessarily wrong.

But even in the event that the Defendants held the view that the trial judge was wrong, I believe that they should have lodged an appeal, as was done by the appellant in the authority cited by the applicant i.e. the Abdul Shakoor Sheikh case. In arriving at this conclusion, I am not only influenced by the course of action in the precedent relied upon by the applicant, in which the wrong decision was challenged by appeal, but more importantly, I have derived guidance from the judgment of the Court of Appeal in National Bank of Kenya Limited Vs Njau [1996] LLR 469 [CAK]. In that case the Court of Appeal delivered itself thus:

> "A review may be granted wherever 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 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.

In the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion in law, it could be a good ground for appeal but not for review. Otherwise, we agree, that the learned Judge would be sitting in appeal on his own judgment, which is not permissible in law".

In the light of these illuminating words by the Court of Appeal, I hold that if the decision of my sister Nambuye J was to be reviewed by me, so as to deprive the respondent the 10 acres which she was granted in the judgment, that would be tantamount to reversing the judgment in relation to the said 10 acres. In effect, I would have purported to sit on appeal yet I have no such authority.

Delay

Before concluding this Ruling, I have come to the conclusion that it would be incomplete if I did not say something about the time it took before the Defendant lodged the present application for review.

The provisions of Order XLIV rule 1 stipulates that any person who considers himself aggrieved, who

"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".

In this case the judgment was delivered on 30/7/92. However, the application for review was only filed almost 4 years later, on 26/4/96. I consider the delay of 4 years to be inordinate, in the light of the express requirement by the rules which require that an application for review be made without any unreasonable delay.

In the case of Panalpina (E.A.) Ltd V Ngae (1999) LLR 2370 (HCK), Waki J. (as he then was) held as follows:

"First the question of delay. Order 44 rule 1 Civil Procedure Rules requires in peremptory language that an application for review be made "without unreasonable delay." The order sought to be reviewed here was made on 23rd September 1998.

The application for review was filed on 16th July 1999, about 10 months later. Plenty of water had gone under the bridge in the matter, as it were, within that period. The affidavit in support of that application made no allusion to the period expired before the application was filed and did not explain it. ……

….. I think that it was erroneous to admit the application after an unexplained period of 10 months had expired and various developments had taken place in the matter".

Commenting on the question as to what duration might be construed as constituting a period of "unreasonable delay, Aganyanya J. held as follows, in the case of Apondi V CMB Packaging Kenya Limited (1977) LLR 2153 (HCK;

"Given that the respondent (sic) under Order 44 should be made without unreasonable delay, there is no way one can say over two years before filing the application subject to this appeal was not

unreasonable".

The cases of Panalpina and Apondi, above make it abundantly clear that if an application for review is not made timeously the same ought to be denied. That position is further amplified by Hewett J. in HCCC NO. 980 OF 1995 Afri Credit Finance Ltd Vs Safari Image Ltd & 2 others wherein he held that even though there was an error apparent on the face of the record, and also that there was a new and important matter which the defendant could not with due diligence have put before the court,

> "but that the review jurisdiction under the Civil Procedure Rules cannot be exercised in view of the Defendant's delay".

The delay in that case was of about 5 years.

In conclusion, I hold that the applicant has failed to satisfy me that the error complained of, (if indeed it is an error) is such as would be properly described as an error apparent on the face of the record. I also find hat the Defendant has been guilty of unreasonable delay before filing the application Thus even if I were wrong on the question as to whether the error complained about could be properly described as an error apparent on the face of the record, I would still come to the conclusion that I would be unable to review the Judgment because of the inordinate delay in bringing the application.

I have therefore come to the inescapable conclusion that the application dated 24/4/96 be dismissed. However, whilst costs ordinarily follow the event, I am inclined to order each party to bear their won costs: This is because the Plaintiff failed to respond to the application in any way. There was no Replying Affidavit or Grounds of opposition. The Plaintiff also failed to attend court to put forward any submissions. For these reasons, although the application has been dismissed, the most reasonable order that commends itself to me in this matter is that each party should bear their own costs. It is so ordered.

Dated at Nairobi this 10th day of February 2004.

FRED A. OCHIENG

Ag. JUDGE