REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 785 OF 2002

ELIJAH GITHINJI WACHIRA …………………………. APPELLANT

VERSUS

GERALD GIKONYO KANYUIRA ………..………. 1ST RESPONDENT

STANLEY GATHOGO GIKONYO ………………. 2ND RESPONDENT

JUDGMENT

By a Plaint dated and filed on March 16, 1994 the first Respondent (Plaintiff in the Lower Court) prayed for specific performance over a contract to purchase land from the Appellant (Defendant in the Lower court).

On May 6, 1994 once Defence had been filed, he made an application to the Lower Court for the Defence to be struck out under Order 6 Rule 13 and Order 12 Rule 6 of the Civil Procedure Rules. Judgment was entered in his favour, and the land was eventually transferred to him.

Three years later, on June 24, 1997 the Appellant filed an application for Review of the Judgment under Order 44. Meanwhile, as this application was filed, the suit land was transferred to the 3rd Party, who is the 2nd Respondent here. No grounds of review were stated on the body of the application, but the annexed affidavit outlined the grounds. These were that the case had not been formally proved; that Land Control Board consent had not been obtained; and the agreement produced before the Court was not for the sale of the land.

The Lower Court found no merit in this application for review, and dismissed the same in a Ruling dated October 2, 2001. It is this Ruling that is the subject of this Appeal.

There are thirteen grounds outlined in the Memorandum of Appeal, essentially focusing on one major issue – that the application for review should have been allowed, and the aforesaid Judgment set aside to enable the Appellant prosecute his case on merit. That is indeed the issue before this Court.

In T***okesi Mambili vs Simion Litsanga Sabwa*** ***(C A 90 of 2001 – Kisumu)*** the Court of Appeal stated as follows:

Order 44 Rule 1(1) of the Civil Procedure Rules provides:

> ***"1(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 from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, aft er 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 judgment to the court which passed the decree or made the order without unreasonable delay. Hence in order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record of for any other sufficient reason. In the application before the superior court the appellants failed to prove discovery of new and important matter or a mistake on the face of the record."

Although the Court has unfettered discretion to review its judgments, there is now established some principles upon which that discretion may be exercised. In ***National Bank of Kenya Ltd vs Ndungu Njau*** ***Nairobi Civil Appeal No 211 of 1996 (unreported)*** (Kwach, Akiwumi & Pall, JJ.A.) the Court said as follows:

"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 argu ment 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 erro neous 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 contro versy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of 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. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

Those are the principles governing applications for review. The Lower Court, applying the above principles, concluded that there had been no discovery of new and important matter or evidence which was not within the applicant's knowledge, or could not be produced at the time the Order was made.

The Court also concluded that the review was based more on points of law, which could for m the basis of appeal, but not review, and finally that the application had not been brought within a reasonable time, in that it had taken three years to file the application for review.

I am satisfied that the Lower Court applied these principles correctly, and came to the correct decision. The Appellant here was seeking an indirect way of appealing against the Lower Court's decision, and having failed to file an appeal on time, attempted a second bite of the cherry through a review application. In any event, he was far too late even for that. Three years of unexplained delay was in itself a sufficient reason to disallow his application.

Finally, and for what it is worth, the suit property has long been transferred to the 2nd Respondent. It would have been quite futile to allow this appeal.

Accordingly, and for reasons outlined, this appeal is dismissed with costs.

Dated and delivered at Nairobi this 25th day of May, 2004.

ALNASHIR VISRAM

JUDGE