



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

Civil Appeal 10 of 1980

FRANCIS ORIGO..... 1st APPELLANT

PETER PANYAKO..... 2nd APPELLANT

AND

JACOB KUMALI MUNGALA..... RESPONDENT

RULING

Some 20 years ago, Jacob Kumali Mungala (hereinafter "the Respondent") sued the two Applicants for an order for vacant possession of land parcel number 35 Chepsaita settlement scheme (hereinafter "the suitland") which is registered in his name.

The trial Magistrate refused the Applicants' claim that they had jointly purchased the suit land with the Respondent and dismissed their counterclaim for a declaration that the Respondent was registered as owner of the suit land as their trustee. The Applicants being dissatisfied with that finding appealed to this court. On August 31, 1981 MEAD, J., dismissed their appeal. On October 27, 1981, MEAD, J., refused to grant the Applicants a stay of execution pending appeal to the Court of Appeal. On March 4, 1981 the Applicants filed a Notice of Appeal against the judgment of MEAD, J. On November 31, 1981 the Applicants filed a Notice of appeal against the order of MEAD, J. refusing stay of execution. The Appeals were struck out for delay.

Now, twenty years later, they bring this application for Review on the ground, inter alia, that the Applicants were not allowed by the trial Magistrate to call the evidence of a key witness. The Applicants' case is that if the evidence of the key witness had been called, the court would have come to a different conclusion. According to Mr. Machio, Counsel for the Applicants, this key witness would have testified that he was the original owner of the suit land and that he sold the same to three people - the Respondent and the two Applicants, and that it was their wish that the suit land be registered in the name of the Respondent in trust for all three. The Vendor has sworn an affidavit to this effect which is annexed to the application. Mr. Machio argued that the Applicants, who have continued to occupy portions of the suit land to this day, have a legal interest in the same.

He referred to the cases of Dyer v. Dyer (1788) 2 Cox, Eq. (as 92 (referred to in Pettit v. Pettit [1970] A.C. 777 at p. 814, and Onyango Omoke v. John Qmoke (C.A. No. 10 of 1981) which he said laid down the principle that where contributions have been made, a resulting trust arises. Referring to the case of Bancroft and Ano. v. City Council of Nairobi and Ano. [1971] E.A. 151, Mr. Machio argued that failure to allow a key witness to be called was a sufficient reason to allow a review.

In response to the concern expressed by this Court in bringing this application after 20 years, a delay that the Court regarded as highly inordinate, Mr. Machio explained that the Applicants had been poorly advised, as well as the extra judicial intermeddling by the office of the

Attorney General and the Provincial Administration. In any event, Mr. Machio submitted, that the delay was not unreasonable in the circumstances.

Mr. Momanyi, for the Respondent argued that once the Applicants had chosen to appeal, they could not bring an application for Review. He submitted that for an application of this nature to succeed, there must be discovery of new evidence which could not have been adduced after the exercise of due diligence, and should not have been within the knowledge of the party applying. He argued that the issue of insufficient evidence was neither raised at the trial, nor at appeal, and the same could not be raised now. According to him, a delay of 20 years was unreasonable and that this application was, therefore, incompetent, mischievous and intended to defeat the course of justice. He observed that the Applicants moved the court only to stall the Respondent's attempt to execute the orders of this Court.

The issues before this Court are as follows: Can an application for Review be made when an appeal has been preferred? Is this an appropriate application for Review under Order 44 of the Civil Procedure Rules? What is a reasonable time within which an application for Review should be made?

Let us examine these issues in greater detail.

To begin with the first issue, the answer is no. An application for Review is not available to a party who has exercised his right of appeal. Order XLIV Rule 1(1)(a) of the Civil Procedure Rules is very clear on this issue. It reads in pertinent part as follows:

"(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)..... may apply for review of the

3 judgment..... "

Section 80 of the Civil Procedure Act which deals with reviews has a similar provision. The Applicant could not file this application having previously filed an appeal against the order sought to be reviewed. It is enough that the applicant had filed a notice of appeal in this court, (see Ujagar Singh v. Runda Coffee Estates (1966) EALR 263). It matters not that that appeal was "withdrawn," or struck out. This conclusion is sufficient to dismiss this application.

Let me now consider the other issues:

An application for Review is governed by Order XLIV Rule 1 which reads as follows:

- "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, 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 judgment to the court which passed the decree or made the order without unreasonable delay." Some of the important criteria necessary for invoking the above rule are: 1) discovery of new and important matter or evidence which, after due diligence, was not within the Applicant's knowledge or could not

be produced at that time; note strict proof of this allegation is required under the Proviso to Sub-Rule (3); or (2) there is some mistake or error apparent on the face of the record; or (3) "for any other sufficient reason;" and (4) there is no unreasonable delay in making the application. An Applicant must satisfy any one of the three criteria outlined above, and he must make his application without unreasonable delay.

The Applicants before this court claim that they were unable to produce a key witness at the trial. This is, of course, not 'discovery' of "new and important evidence" as envisaged by the first criterion. The word 'discover', according to the Oxford English Dictionary, means "to invent or find something not known before." The Applicants have not shown that they "discovered" a new witness, whose testimony now is likely to affect the Court's decision. The witness existed, and was known to all the parties. It is the Court that did not allow his evidence. This may be a ground for "appeal" but not "review." In the circumstances, the Applicants have not satisfied the first criterion outlined above.

With regard to the second criterion, there is no allegation here of "mistake or error apparent" and so, this brings us to the third, and final, criterion being "any other sufficient reason."

Now, what does this term "any other sufficient reason" mean, and how does it apply to the case before this court?

Mr. Machio has argued that the Court's refusal to allow the evidence of a key witness constituted "sufficient reason" to invoke the review provisions. He did not cite any authorities, leaving the court to research and consider the following authorities:

In the case of Sardar Mohamed v. Charan Singh Nand Singh [1959] E.A. 793, Farrell, J. applied a broad interpretation to section 80 of the Civil Procedure Act, holding that the section conferred an unfettered right to apply for review, and an unfettered discretion in the court to make such order as it thinks fit. In that case the 1st Respondent's car broke down while he was going to court. He arrived in court 20 minutes late. His advocate was in court and informed the Magistrate that he had no instructions. FARREL, J. upheld a Review on this ground. In the present case, the Applicants failed to produce the key witness at the hearing, and were not granted an adjournment. That should have been a ground of appeal to the High Court. It never was, as is evidenced by the Memorandum of Appeal annexed to the documents filed in court. It cannot now be a ground for Review.

In Nairobi City Council v. Thabiti Enterprises. Ltd. (NAI. C.A. No. 264 of 1996) Tunoi, JA said that "The current position would, then appear to be that the Court has unfettered discretion to review its own decrees or orders for any sufficient reason." In that case, the Court said that Review would be allowed where there was error on the face of the judgment. In Wangechi Kimita v. Mutahi Wakibiru (Nyeri C.A. 80 of 1985) the Court made a determination on a dispute over land having been led to believe that the same measured 3.1 acres. Upon survey, it was discovered that the land actually measured 4.5 acres. This was sufficient ground for review, the court held. The case before this court is very different. It is about an adjournment not being granted by the Trial Magistrate to receive the evidence of a key witness. It may afford the Applicants a good ground of appeal, but not review.

Finally, can it be said that this application has been brought without unreasonable delay? Should litigation not come to an end?

This has been a longstanding matter. It revolves around a large portion of land. Because of the continuing dispute, the parties have been unable to settle their affairs. The law is concerned with offering protection to its subjects to enable them carry on with their lives. Unending litigation does not achieve this object. In Lakhamshi Bros. Ltd. v. Raja and Sons [1966] E.A. 313 at p. 314, SIR CHARLES NEWBOLD, P. said as follows: "There is a principle which is of the VERY GREATEST IMPORTANCE in the administration of justice and that principle is this: IT IS IN THE INTEREST OF ALL PERSONS THAT THERE SHOULD BE AN END TO LITIGATION. This court is now the final Court of Appeal and when this court delivers its judgment, that Judgment is; so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, to the limited application of the slip rule (review)." If suits were to go on endlessly, the functions of the Courts

would be rendered useless. Parties to a suit would never know whether their rights had finally been determined to enable them settle down and continue with their lives, instead of being bogged down with endless litigation, and threatened litigation.

This application has been brought twenty years after the judgment and orders sought to be reviewed were made. It does not only offend the principle that there must be an end to litigation but it is also brought after an inordinate and unreasonable delay. By no stretch of imagination can a 20 year delay be regarded as "reasonable," considering that the "reasons" for delay were poor legal advice, and extra judicial interference. Time is now propitious to put this litigation to a permanent end, and not to vex the Respondent forever.

Having considered the typed proceedings in the lower Court, it is clear to me that both the Courts - the lower Court and the High Court found that even if the Applicants had established their case, the same would have failed for non-compliance with a statutory requirement being section 6 of the Land Control Act, which made the transaction void. Apparently, the parties had not complied with the mandatory provisions of that Act and the absence of the key witness notwithstanding, the Applicants would not have succeeded,

The issue is whether there can be a Review of such a finding. A Judge's conclusion on a point of law cannot be a subject for review. In the Lakhamshi Bros case supra and in Vallabhdas Karsandas Raniga v. Mansukhlal Jivraj and Others [1965] E.A. 700 the Courts held that there cannot be review where the court is asked to overturn its own judgment in the same proceedings. Similarly, in the cases of Abasi Balinda v. Fredrick Kangwanu (1963) E.A. 557, and National Bank of Kenya Ltd. v. Ndung'u Njau (C.A. No. 211 of 1996) the Courts held that an erroneous conclusion of law, or evidence, is no ground for a review, though it may be a good ground for appeal. In this application, it cannot be urged to consider whether the finding that the transaction was void was proper. That would amount to asking this court to question its previous judgment in the same matter and that would amount to sitting on appeal of its own decision.

Accordingly, for all the reasons stated above, I have come to the conclusion that there is absolutely no basis to this application and the same is dismissed with costs to the Respondent.

Dated and delivered at NAIROBI this 20th day of November, 2000.

ALNASHIR VISRAM

COMMISSIONER OF ASSIZE