



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC APPEAL NO. 3 OF 2019

JOHNSTONE NDEGE.....1ST APPELLANT

DAVID KENGERE ATEBE.....2ND APPELLANT

VERSUS

JOSEPH KANG'ETHE MBUGUA..... 1ST RESPONDENT

ABDALLA MOHAMMED..... 2ND RESPONDENT

(Consolidated with ELC Appeal No. 28 of 2019)

ABDALLA MOHAMMED.....APPELLANT

VERSUS

JOSEPH KANG'ETHE MBUGUA.....1ST RESPONDENT

JOHNSTONE NDEGE.....2ND RESPONDENT

DAVID KENGERE ATEBE.....3RD RESPONDENT

JUDGMENT

This appeal arises from the ruling and orders made on 18th January, 2019 by Hon. G.A Mmasi, SPM in CMCC No. 13297 of 2006(hereinafter referred to only as “the lower court”).

Background:

Joseph Kangethe Mbugua (hereinafter referred to only as “the respondent”) filed a suit in the lower court on 28th November, 2006 against Abdalla Mohamed, Johnstone Ndege and David Kengere Atebe (hereinafter referred to only as “the appellants”) in respect of all that parcel of land known as L.R No. 6845/93(hereinafter referred to only as “the suit property”). The respondent failed to prosecute the suit as a result of which the same was dismissed for want of prosecution on 29th September, 2010. For about 4 years, the respondent took no action in the matter. On 3rd December, 2014, the respondent filed an application seeking to set aside the orders for the dismissal of the suit. The application was heard by Hon. T.S. NCHOE, RM who dismissed the same in a ruling delivered on 23rd September, 2015. The court found that the respondent had delayed in bringing the application and that the delay was unexplained. The court found the respondent guilty of laches and held that there was no justification for reinstating a case that was dismissed more than 4 years prior to the filing of the reinstatement application.

After the dismissal of his application seeking to reinstate the suit, the respondent went to sleep again for another 3 years. On 26th November, 2018, the respondent filed an application dated 23rd November, 2018 seeking the following principal orders;

1. That the court orders dated 23rd September, 2015 dismissing the plaintiff’s application dated 23rd September, 2014 be reviewed and/or varied.

2. That the plaintiff's suit be reinstated for hearing.

3. That pending the hearing and determination of the plaintiff's suit, the defendants be restrained from alienating, trespassing, entering and/or constructing upon the plaintiff's land known as Title No. 157212, L.R No. 6845/93(the suit property).

4. That costs be in the cause.

The respondent's review application was brought on the grounds that; the respondent was now the proprietor of the suit property, the appellants were occupying the property illegally, the fact that the respondent had a title to the suit property was not brought to the attention of the court when it dismissed the respondent's application for reinstatement of the suit, it was in the interest of justice that the review orders be granted and that the appellants would suffer no prejudice if the orders sought were granted.

The application was opposed by the appellants through grounds of opposition and replying affidavits. The appellants contended among others that no grounds for review were disclosed in the application and that the application was an attempt by the respondent to have his application for reinstatement of the suit that had been dismissed heard afresh. The appellants contended further that the application was brought after unreasonable delay and that the same was an abuse of the process of the court.

The respondent's review application was heard in the lower court by Hon. Grace Mmasi, SPM and in a ruling delivered on 18th January, 2019, the court allowed the application and made various orders. The court set aside the orders made earlier by Hon. T.S. NCHOE, RM on 23rd September, 2015 dismissing the respondent's application for reinstatement of the suit, reinstated the suit and on top of that, granted the respondent an injunction restraining the appellants from dealing with the suit property pending the hearing and determination of the suit. The court also made some orders on costs in relation another suit between the parties that was pending before this court and awarded the appellants thrown away costs.

In arriving at its decision, the court appreciated the fact that the suit had been pending in court for 12 years and that respondent's previous application seeking to reinstate the suit had been dismissed. The court then went ahead to consider whether the respondent had satisfied the grounds for review. The court observed that the respondent had obtained a title for the suit property. The court cited Barnabas Maritim v Manywele Korgoren & another, Civil Suit No. 199 of 2015 (Kericho ELC) and expressed the view that although the respondent was indolent, it was not fair to shut him out of the seat of justice. The court was of the view that the respondent should be given a chance to ventilate his case. It was on the basis of the foregoing that the lower court allowed the review application and made the orders that I have referred to. The court did not say anything about the limb of the respondent's application that sought injunction that was also granted. The court did not consider whether a case had been made out for a temporary injunction in the circumstances.

The appellants' cases:

The appellants in ELC Appeal No. 3 of 2019 in their Memorandum of Appeal dated 4th February 2019 challenged the ruling and orders made by Hon. Grace Mmasi, SPM on the following grounds;

- a) The learned magistrate erred in law and in fact in allowing the respondent's application dated 23rd November 2018 thereby reviewing the Court Orders dated 23rd September 2015 and reinstating the respondent's suit.
- b) The learned magistrate erred in law and in fact in disregarding the provisions of the law on review applications.
- c) The learned magistrate erred in law and in fact in failing to appreciate that there was no discovery of new evidence which after due diligence was not within the knowledge of the respondent or could not be produced by him when the Court Orders dated 23rd September 2015 were made.
- d) The learned magistrate erred in law and in fact in failing to appreciate that there was no mistake or error apparent on the face of record.
- e) The learned magistrate erred in law and in fact in failing to appreciate that there was no other sufficient reason to grant the application for review.
- f) The learned magistrate erred in law and in fact in failing to appreciate that the application for review was made after unreasonable, inordinate and inexcusable delay.
- g) The learned magistrate erred in law and in fact in failing to appreciate that the prayer for reinstatement was made after more than twelve years from the date when the cause of action arose.
- h) The learned magistrate erred in law and in fact in sitting on an appeal by hearing and determining the prayer for reinstatement, an issue canvassed before and orders delivered by a court of equal stature.
- i) The learned magistrate erred in law and in fact in holding that the interim orders issued on 26th November 2018 remain in force until the suit is heard and determined.

The consolidated appeals were heard by way of written submissions. The appellants in ELC Appeal No. 3 of 2019 filed their submissions on 1st July, 2020. They submitted that the substratum of the respondent's application dated 23rd November 2018 in the lower court was that he

did not have the title for the suit property when his earlier application for reinstatement of the suit was dismissed and that the existence of the title was new evidence. The appellants argued that the requirements of Order 45 of the Civil Procedure Rules were not met as the title in question had been issued in August, 2014 and had been produced in support of the respondent's application dated 2nd December 2014 that was dismissed on 23rd September 2015. It was therefore their submission that the said title was part of the court record when the order that was sought to be reviewed was made. The appellants submitted that the existence of the said title could not therefore be termed as new evidence which was not within the knowledge of the respondent when his earlier reinstatement application was dismissed. It was also their submission that the learned magistrate did not refer to the grounds for review and only cited Barnabas Maritim v Manywele Korgoren & another(supra) in arriving at her decision. The case, it was submitted, dealt with reinstatement of suits not application for review.

Relying on the cases of Mwihoko Housing Co. Ltd v Equity Building Society (2007) eKLR and National Bank of Kenya Limited v Ndungu Njau (1997) eKLR, the appellants submitted that the respondent ought to have appealed against the orders given on 23rd September 2015 rather than seek a review.

The appellants cited Order 45 Rule 1 (1) of the Civil Procedure Rules and Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR and submitted that an application for review brought after unreasonable delay should be disallowed. The appellants submitted that in this case, there was an unexplained delay of three years before the respondent filed an application for review.

The appellants submitted further that the trial court erroneously allowed the prayer for reinstatement while the issue had already been decided and the court was *functus officio* in respect thereof. The appellants submitted that the prayer was *res judicata*. Relying on the cases of Serve In Love Africa (Sila) Trust v Abraham Kiptarus Kiptoo & 2 Others [2019] eKLR and Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR, the appellants submitted that the learned magistrate wrongfully sat on appeal on the issue of reinstatement of the suit that had been determined by her colleague magistrate in 2015.

The appellants cited Shuweka Suleiman Ali v National Bank of Kenya Limited & 2 Others [2017] eKLR and argued that the learned magistrate erred in extending interim orders of injunction that were granted to the respondent ex parte when he filed his application for review since the said orders were void *ab initio* having been issued on 26th November, 2018 when the suit stood dismissed.

The appellant in ELC Appeal No. 28 of 2019 in a Memorandum of Appeal dated 18th February 2019 challenged the ruling and orders made by Hon. Grace Mmasi, SPM on the following grounds;

- a) The learned magistrate erred in law and fact in exercising her discretion in allowing the Notice of Motion application dated 23rd November 2018 (hereinafter the Application).
- b) The learned magistrate erred in law and fact in failing to appreciate, consider and apply the principles governing the application before her.
- c) The learned magistrate erred in law and fact in misdirecting herself in her interpretation and application of the principles governing the application before her.
- d) The learned magistrate erred in law and fact in failing to consider, interpret and apply the grounds applicable with respect to an application for review and as a result arrived at the wrong conclusion.
- e) The learned magistrate erred in law and fact in failing to appreciate and consider submissions by the appellant to the effect that there was no new and important evidence presented by the respondent as required by law.
- f) The learned magistrate erred in law and fact in failing to appreciate and consider that there was inordinate delay in the filing of the application.
- g) The learned magistrate erred in law and fact in failing to consider, interpret and apply the principles for the grant of orders of an injunction and therefore arrived at a wrong conclusion.
- h) The learned magistrate erred in law and fact in extending the interim orders issued by Hon. Mbeja on 26th November 2018 without granting the appellant the right and opportunity to be heard in respect of the said orders.
- i) The learned magistrate erred in law and fact in extending the interim orders issued by Hon. Mbeja in the absence of submissions from the parties.
- j) The learned magistrate erred in law and fact in failing to appreciate and consider the fact that there was no legal basis for extending the interim orders pending the hearing and determination of the suit.
- k) The learned magistrate erred in law and fact in extending interim orders pending the hearing and determination of the suit in the absence of such suit.
- l) The learned magistrate erred in law and fact in extending interim orders pending the hearing and determination of the suit when the same could be granted only subsequent to the reinstatement of the suit and upon a substantive application seeking such relief.
- m) The learned magistrate erred in law and fact in exhibiting bias against the appellant by relying solely on the submissions and authorities of the respondent applicant.

n) The learned magistrate erred in law and fact in her appreciation, interpretation and application of Barnabas Maritim v Manywele Korgoren & another(supra).

o) The learned magistrate erred in law and fact in considering irrelevant matters in arriving at her decision.

In his submissions, the appellant submitted on the following four issues;

1. Whether the learned magistrate erred in failing to consider, appreciate and apply the principles governing the application that was before her.
2. Whether the learned magistrate erred in extending the interim orders of injunction issued by Hon. Mbeja on 26th November 2018 in the absence of such prayer in the application.
3. Whether the learned magistrate erred in relying exclusively on submissions and authorities tendered by the respondent and in so doing arrived at a wrong conclusion.
4. Whether the learned magistrate erred in her appreciation, interpretation and application of the authority of Barnabas Maritim v Manywele Korgoren & another(supra).

On the first issue the appellant relied on Order 45 Rule 1 of the Civil Procedure Rules and Kireru Kapoya & 2 Others v Simon Mutunkei Kapoya & Ruth Wanjiku Kapoya [2019] eKLR and submitted that the title deed in question was not new evidence as it had been issued on August, 2014 and had been produced by the respondent as an annexure marked JK3 in his application dated 2nd December 2014. Consequently, it was not new and important evidence to warrant the grant of the orders of review as it was in the respondent's possession at the time the orders he wanted reviewed were issued.

Relying on Order 45 Rule 1 of the Civil Procedure Rules and Michael Muriuki Ngibuini v East African Building Society Limited [2015] eKLR, the appellant submitted that the three-year delay in filing an application for review by the respondent was unreasonable. It was further submitted that the respondent had failed to demonstrate any reasonable explanation for the delay such as to warrant the court's discretion in issuing review orders.

The appellant submitted further that the respondent ought to have appealed if he was dissatisfied with the orders issued on 23rd September, 2015. Relying on Pancras T. Swai v Kenya Breweries Limited [2014] eKLR and Sanitam Services (E.A) Limited v Rentokill (K) Limited & another [2019] eKLR, the appellant argued that the learned magistrate sat on an appeal since the issue of reinstatement had already been determined on 23rd September 2015. The appellant also cited Peterson Ndungu & 5 others v Kenya Power and Lighting Company Ltd [2018] eKLR, and submitted that the court was *functus officio* and ought not to have considered the matter.

On the second issue, the appellant submitted that the learned magistrate erred in extending the interim orders as the same could only be extended upon a reinstatement of the suit and upon a substantive application seeking such relief. In support of this submission, the appellant relied on Shuweka Suleiman Ali v National Bank of Kenya Limited & 2 Others [2017] eKLR.

On the third issue, the appellant submitted that the learned magistrate showed bias towards him by failing to consider his submissions and his list of authorities and therefore reached a wrong conclusion. The appellant relied on Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR in support of this submission.

On the last issue, the appellant submitted that the learned magistrate's reliance on Barnabas Maritim v Manywele Korgoren & another(supra) was erroneous as the case was about reinstatement of a delayed suit and not review.

The respondent's case:

The respondent in both appeals supported the ruling and orders made by Hon. Grace Mmasi, SPM on 18th January, 2019 on the following grounds;

- a) That the trial court correctly allowed his application for review and reinstated CMCC No. 13297 of 2006 for prosecution within 90 days from 18th January, 2019.
- b) He was ordered to pay the appellants throw away costs of Ksh. 15,000/-.
- c) That having been paid throw away costs, the appellants are estopped from challenging the learned magistrate's ruling.
- d) That the appellants' right to be heard and to defend themselves in the lower court is guaranteed.
- e) He is the registered owner of the suit property.

In his submissions filed on 2nd September, 2020, the respondent argued that the trial court correctly addressed itself to the facts and principles of the law in allowing the reinstatement of his suit. On the issue of whether he proved the existence of a new matter or evidence in order to be granted the orders of review, the respondent argued that he was not in possession of the title deed in question when the dismissal order was made. It was his submission that although the document was issued on 14th August 2014, it was possible that he could have

obtained it much later, an occurrence that he stated was common knowledge.

On the issue whether he was indolent, the respondent submitted that he was not. He argued that the application was filed on 26th November, 2018 when he also filed a notice of change of advocates. The respondent submitted that he was the registered owner of the suit property and that the appellants had neither denied that fact nor put forth any document to prove their ownership of the property. The respondent urged the court to recognize him as the prima facie owner of the suit property.

Relying on Article 159 of the Constitution and the case of Barnabas Maritim v Manywele Korgoren & another(supra), the respondent submitted that he should not suffer the loss of his land due to undue regard to procedural technicalities. He submitted that his failure to file the application on time was a technicality that the appellants who had not proved ownership of the property were relying on. The respondent submitted that he should be allowed to proceed with his case and have it determined on merit.

Relying on the case of John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation) [2015] eKLR, the respondent submitted that by accepting the throw away costs, the appellants had waived their rights to challenge the trial court's decision.

Analysis of the issues arising and determination thereof:

Section 80 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides as follows:

80. Review

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from 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 order thereon as it thinks fit.

Order 45 Rule 1 (1) of the Civil Procedure Rules provides as follows:

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 judgement to the court which passed the decree or made the order without unreasonable delay.

Rule 3(2) of the same Order provides that:

Where the court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

In my view, the only issue arising for determination in this appeal is whether the lower court correctly exercised its discretion in the respondent's review and injunction application that was brought before it. It is settled that the court's discretionary powers must always be exercised judiciously and not capriciously. In Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

In Shah v Guilders International Bank Ltd. [2002] 1 EA 269(CAK) the court stated that:

“....., Mr. Commissioner Ransley was clearly exercising his discretion. To be able to interfere with his exercise of discretion, the appellant was bound to demonstrate that in coming to this decision, the commissioner took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account, or that he misapprehended the law applicable, or that he did not correctly appreciate the bearing of some evidence or that the decision itself was plainly wrong.”

In Mbogo v Shah [1968] E.A 93, it was held that:

“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice.”

I am persuaded that the lower court exercised its discretion erroneously. The application before the learned magistrate was for review. It was not an appeal. The respondent had a duty to satisfy the conditions for review. Under Order 45 of the Civil Procedure Rules pursuant to which the respondent's application was brought, an order for review can only be granted where an applicant satisfies the court of, the discovery of a new and important matter or evidence which was not within his knowledge or which could not be produced by him at the time of the issuance of the decree or order sought to be reviewed or the existence of some mistake or error apparent on the face of the record or the existence of sufficient reason that justifies a review.

From the grounds set out on the face of the application that was brought by the respondent in the lower court, it is difficult to pinpoint the specific grounds for review upon which the application was based. The grounds were general in nature. The ground that the respondent highlighted and which was given prominence by the lower court was that of discovery of new and important evidence. As provided in Order 45 Rule 3(2) of the Civil Procedure Rules reproduced above, where an application for review is brought on discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order sought to be reviewed was passed, the allegation must be strictly proved.

The new evidence that the respondent alleged to have discovered was the fact that he was indeed the registered proprietor of the suit property and that a title had been issued in his favour. As correctly submitted by the appellants the fact that the respondent was the registered owner of the suit property and the fact that a title had been issued in his favour was not some new matter or evidence that was not within the knowledge of the respondent or that he could not produce when his application to reinstate the suit was dismissed by Hon. T.S.Nchoe R.M on 23rd September, 2015. As correctly submitted again by the appellants, the Certificate of Title for the suit property was issued on 15th August, 2014 and the same was in the possession of the respondent and he used it as an annexure to his affidavit in support of the application dated 2nd December, 2014 that was dismissed on 23rd September, 2015.

It was clear on the face of a copy of the said certificate of title that was annexed to the affidavit of the respondent in support of his review application that the same had been attached as an annexure to the respondent's earlier application for the reinstatement of the suit and that the same was considered by Hon. T.S. Nchoe R.M before he dismissed the application on 23rd September, 2015. It follows that the alleged discovery of new matter or evidence was not proved as required by the rules and as such could not have formed a basis for the review of the orders of 23rd September, 2015.

I am also in agreement with the appellants that Hon. Grace Mmasi SPM (hereinafter referred to also as “the lower court” where the context so permits) did not appreciate the fact that she was dealing with an application for review and not an appeal against the decision of Hon. T.S. Nchoe R.M. In my view, the lower court handled the matter as if it was the original application for the setting aside of the dismissal of the suit for want of prosecution which was dealt with by Hon. T.S. Nchoe R.M. I am in agreement with the appellants that the decision in Barnabas Maritim v Manywele Korgoren & another(supra) on which the lower court based its decision was misapplied by the court as it dealt with a completely different situation. The decision in that case would have been relevant in the application for the setting aside of the dismissal of the suit for want of prosecution but not in a review application.

In my view, however much the lower court may have felt that the respondent had been shut out from being heard and denied a chance to ventilate his case, these issues had already been considered by Hon. T.S. Nchoe R.M. and the lower court that was not sitting as an appellate court had no business reviewing and setting aside the decision of a court of the same status on the same grounds. I find the appellants contention that the lower court sat on appeal against the decision of Hon. T.S. Nchoe R.M. not far-fetched.

The other issue that was raised before the lower court and which the court failed to consider was delay in the bringing of the review application. There was not only no ground to warrant a review but the application was also brought after unreasonable delay and which delay was not explained. Order 45 rule 1(1) of the Civil Procedure Rules provides that an application for review must be brought without unreasonable delay. The respondent's application to set aside the order dismissing his suit in the lower court for want of prosecution was dismissed on 23rd September, 2015. The application for review was brought 3 years later on 23rd November, 2018. There was no explanation in the affidavit of the respondent in support of the review application of this inordinate delay. The court should also have considered the fact that the application to set aside the dismissal of the suit for want of prosecution was also filed 4 years after the said dismissal. As a result of this inordinate delay a review order was not available to the respondent.

In addition to reviewing and setting aside the orders of Hon. T.S. Nchoe R.M, the court also granted the plaintiff a temporary injunction. There is no indication in the ruling that the lower court considered the principles for granting a temporary injunction or the arguments for and against the grant of such order. I am of the view that the delay in the prosecution of the suit and in bringing the application for review that was lumped together with the application for injunction should have disentitled the respondent to an equitable remedy of injunction.

Due to the foregoing, it is my finding that the lower court took into account irrelevant matters which it ought not to have taken into account, failed to take into account relevant matters which it ought to have taken into account and misapprehended the applicable law as a result of which it arrived at a wrong decision. The appellants have therefore established valid grounds warranting interference with the lower court's exercise of discretion.

Conclusion:

In conclusion, I find merit in the two appeals before me and make the following orders in respect thereof:

1. The consolidated appeals are allowed.

2. The ruling and orders made by Hon. Grace Mmasi, SPM on 18th January, 2019 in the lower court are set aside and in place thereof, there shall be an order dismissing the respondent's Notice of Motion application dated 23rd November, 2018 that was filed in the lower court on 26th November, 2018.

3. For the avoidance of doubt, the respondent's suit against the appellants in the lower court shall remain dismissed.

4. The appellants in the two appeals shall have the costs of the appeals and of the lower court application aforesaid.

Delivered and Dated at Nairobi this 29th day of April 2021

S. OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Anyonje for the Appellants in ELCA/3/2019

Mr. J.B. Macharia for the Appellant in ELCA/28/2019

Mr. Were h/b Mr. Kulecho for the Respondent

Ms. C. Nyokabi-Court Assistant