M'Nguathi v Kobia & 2 others (Environment and Land Appeal 44 of 2020) [2023] KEELC 17975 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17975 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 44 OF 2020

CK YANO, J

JUNE 7, 2023

BETWEEN

JOSEPH THURANIRA M'NGUATHI ..... APPELLANT

AND

PATRICK KOBIA ..... 1ST RESPONDENT

DLSO IGEMBE SOUTH ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

1. By a judgment delivered on 8th February, 2019 in Maua Chief Magistrate's court ELC No. 12 of 2011, Hon. A.G Munene, SRM ordered that the 1st respondent herein who was the 1st defendant in the lower court forwards the dispute to the Cabinet Secretary in charge of land within a period of 21 days from the date of delivery of the said judgment and in default, the decision of the District Land Adjudication and Settlement Officer stands. The 1st respondent filed an application dated 29th March 2019 seeking for review of the judgment on grounds that the said judgment did not take into account the provisions of Kenya Gazette Notice of 3rd October, 2014 as the said Gazette notice was not brought into the attention of the court during the hearing.

2. By a ruling delivered on 13th November, 2019, the learned trial magistrate reviewed his own judgment on the basis that there was an error in arriving at his earlier decision and dismissed the appellant's case and allowed the 1st respondent's counter-claim. Aggrieved by the said ruling, the appellant filed an application dated 24th January, 2020 seeking to have the ruling of 13th November, 2019 varied and or set aside together with all subsequent orders thereto, and for the judgment of 8th February, 2019 to remain in force. By a ruling delivered on 29th July, 2020, the trial court dismissed the said application. Being aggrieved, the appellant filed this appeal.

3. In the memorandum of appeal the appellant set out the following grounds-;

    1. That the Honourable Learned Senior Reside Magistrate erred in law and in fact in dismissing the application dated 24th January, 2020 against the weight of the evidence and submissions before the court.

    2. That the ruling of 29th July, 2020 went against the principles of natural justice in that the ruling of 13th November, 2019 allowed a party to produce new evidence after the close of the case and after judgment.

    3. That the Honourable learned magistrate A.G Munene Senior Resident Magistrate arrived at the decision without proper consideration of the material facts before him.

    4. That the Honourable learned Senior Resident Magistrate erred in law and in fact in arriving at an erroneous decision.

    5. That the whole of the ruling was against the materials before the court.

4. The appellant prays that the appeal be allowed, that the ruling of 29th July, 2020 be set aside and the application dated 24th January, 2020 be allowed with costs, and that the costs of this appeal and the lower court be granted to the appellant.

5. The appeal was canvassed by way of written submission. The appellant filed his submissions on 25th July, 2022 through the firm of J.O Ondieki & Company advocates while the 1st respondent filed his on 1st November, 2022 through the firm of M/s Mutembei & Kimathi advocates.

The Appellant's Submissions

6. The appellant compressed his grounds of appeal into three and submitted that the learned trial magistrate's ruling of 29th July 2020 went against the weight of evidence when it was apparent that the document which was produced was sneaked into the court after both parties had closed their cases and judgment had been delivered. It is the appellant's submission that after delivering the judgment on the evidence put before him, there was no room again to come and say that one forgot to tender some evidence through an application. That once the court pronounced itself through the judgment, it became functus officio and that the only court which should have interfered with the judgment was the High Court, and that the learned trial magistrate purported to sit as an appellate court in his own judgment.

7. The appellant submitted that in his own ruling, the learned magistrate agrees that "the said gazette notice was not brought into the attention of the court during the hearing" and that the parties were given humble opportunity to present their cases and close with their respective submissions. The appellant submitted that it is not procedural for a party to go back to the same court which had delivered its judgment and move the court to make a different finding based on the evidence which was not put before the court when judgment was delivered. That litigation must come to an end and if parties were allowed to re-open cases in the same court on the basis of forgotten evidence or omitted exhibits, it will be difficult for matters to move to the next level.

8. The appellant submitted that there was sufficient evidence, that the relied document to set aside the judgment was not produced as an exhibit during the hearing of the matter nor was it part of the exhibits listed for use in court. That there were no grounds which were given why it was not produced during the hearing of the suit, though it was in existence. The appellant submitted that once a party comes to court he or she must provide his/her list of witnesses and list of documents which must be served

together with the plaint. Further, that during pre-trial for compliance with Order 11 the parties must bring on board all the documents and statements which they intend to use during the hearing of the matter. That in this case, the said gazette notice was not among such documents listed to be used.

9. It is also the appellant's submission that the trial magistrate did not consider his submissions on record while dismissing the application to set aside the ruling of 29th July, 2020. That had he considered the materials before him the learned magistrate would not have dismissed the appellant's application.

The 1St Respondent's Submissions

10. The 1st respondent submitted that the lower court's ruling delivered on 13th November, 2019 was in respect of an application by the 1st respondent to review the judgment delivered on 8th February, 2019 on the ground that the 1st respondent had seized new evidence that is very material in the suit and had not been brought into the attention of the court during the hearing of the case, thus causing the court to arrive at an erroneous judgment. The 1st respondent cited Order 45 Rule 2 of the Civil Procedure Rules and submitted that the trial court had jurisdiction to review its own judgment once it was alerted of new evidence that affected the judgment as meted out. That the judgment that had been entered earlier issued a declaration citing that the District Commissioner had no mandate to hear appeals to the minister on land disputes, and that owing to the existence of a Gazette notice that proved that the minister had donated appellate jurisdictional powers to the District Commissioner to hear appeals, then the judgment and decree would have been enforceable against the District Commissioner and would have amounted to res-judicata if the same was tried again by the minister on appeal.

11. The 1st respondent submitted that it is only right that any advocate in upholding his duties and responsibilities as an officer of the court, brings to the court's attention any laws and rules that are inforce, or new evidence, to ensure that fairness and true justice has been meted out, and not stand aside quietly and let the seat of justice be in ridicule for making determinations and orders that are unenforceable and nugatory. It is the 1st respondent's submission that the ruling delivered on 13th November 2019 was sound as it took into consideration the response and submissions of all parties and upheld the rule of law and oxygen principles which require that the justice should be fair, affordable, just and equitable and that the ruling was grounded on sound principles of law, and the same was allowed on merit.

12. The 1st respondent submitted that the issue raised by the appellant herein in his subsequent application were not embodied in his response and submissions in regard to the review application which was heard and determined following participation of all concerned parties and to note that the appellant herein represented by a different counsel, had been duly served, filed a response and submissions, yet never questioned the clerical error in the parties quoted or the case citation which has been corrected as evidenced in the record of appeal. The 1st respondent submitted that it is trite law that the court on its own motion can adopt amendments, especially typing errors which do not affect the substratum of the pleadings which is the main issue herein. Further, that the appellant ought to have appealed against the court's ruling delivered on 19th November, 2019 instead of filing the application dated 24th January, 2020 in the same court. Further, that the appellant sought to mislead trial court by claiming that he was denied a chance to cross examine the 1st respondent to verify the authenticity of the document that was relied on to set aside the judgment as both parties through their advocates agreed to dispose of the matter by way of written submissions.

13. It is the 1st respondent's submission that this appeal lacks merit, baseless and mischievous and does not raise any issue worth the court's attention, adding that the same is defective and should be struck out and or dismissed with costs.

Analysis and Determination

14. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-asses and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law.

15. The only issue I find for determination is whether the trial court was justified in dismissing the application dated 24th January, 2020 which sought to vary or set aside the ruling of 13th November, 2019 together with all subsequent orders. The application dated 24th January, 2020 basically sought to review the ruling of 13th November, 2019 which reviewed the judgment delivered on 8th February, 2019 on account of new evidence in form of Kenya Gazette notice of 3rd October 2014 which was not brought into the attention of the trial court during the hearing of the case. The issue for determination therefore is whether the trial court was justified in reviewing the said judgment and whether he rightly dismissed the application dated 24th January, 2020.

16. From the material on record, it is common ground that in the judgment delivered on 8th February 2019, the issue for determination was whether the District Commissioner Igembe South District had power to determine the dispute under the *Land Adjudication Act*, Cap 284 laws of Kenya. Section 29 of the said Act provides that an appeal is to be made to the minister in charge of lands and the minister could delegate his powers to a public officer. From the Kenya Gazette notice of 3rd October, 2014, it was apparent that the minister had delegated his powers to the District Commissioner of the particular district. It was not disputed that the District Commissioner was the one designed to hear the appeal in question on behalf of the minister.

17. Under Order 45 of the Civil Procedure Rules, review can only be allowed if the applicant satisfies the court of the following-;

    1. Discovery of new and important matter of evidence which, after 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.

    2. Mistake or error apparent on the face of the record.

    3. Any other sufficient reason which may make the court to review its order.

18. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object of this provision is neither to enable the court to write a second judgment or to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

19. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased – v- Kariuki Marega & another (2018) eKLR the Court of Appeal stated as follow-;

> " We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

20. In the same breadth, the Court of Appeal in the case of Rose Kaiza – Vs _ Angelo Mpanjukaiza (2009) Eklr held that not every new fact will qualify for interference of the judgment. In this case, the allegation clearly has a basis and has met the requirements of Order 45.

21. On the whether there was an error apparent on the face of record in Muyodi Vs Industrial and Commercial Development Corporation & another EA LR [2006] 1 EA 213 and cited in Muhamed Mungai Vs Ford Kenya Election, and Nomination Board and another, Nairobi High Court Judicial Review Misc. Application No. 53 of 201, the court inter alia went on to state-;

> " For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinion ought to be the subject of an appeal. The applicant before us has not established that there is an error or mistake in decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground."

22. Further, in Attorney General & Others vs Boniface Byanyima, HCMA No. 1789 of 2000 the court citing Levi Outa vs Uganda Transport Company [1995] HCB 340, held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

23. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal positon. If an error is not self- evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act.

24. Put differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment /decision.

25. In the case that was before the lower court, there was discovery of new evidence. The presence of the gazette notice clearly demonstrated that the District Commissioner was one of the officers delegated to determine the dispute and it was evident that the trial court had erred in his judgment delivered on 8th February, 2019 that necessitated the review of the judgment on the ground of discovery of new and important matter of evidence which after 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.

26. In my view the trial court was correct in dismissing the application dated 24th January, 2020.

27. In this case, I am satisfied that the finding of the learned trial magistrate was right and reached a just conclusion in arriving at his decision. In my view, the decision of the trial court was correct and I uphold the same.

28. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondents.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE 2023

In presence of

No appearance for J.O Ondieki & Co.

Kimathi present for 2nd and 3rd respondents

No appearance for 1st respondent.

Court Assistant V. Kiragu

C.K YANO

JUDGE