



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC APPEAL NO.E004 OF 2021

WILFRED MURUNGI MBOROKI.....1ST APPELLANT
MARETE MWANGANDIA.....2ND APPELLANT
JULIUS KINYUA MWIANDI.....3RD APPELLANT
M'RUCHA NGARUNI.....4TH APPELLANT
ALEX KABURIA NKABUNE.....5TH APPELLANT
FRANCIS KIMATHI CHABARI.....6TH APPELLANT
TAZAN MBAABU.....7TH APPELLANT
FRANCIS MWITI MPUTHIA.....8TH APPELLANT
ISAACK KIAMBI CHABARI.....9TH APPELLANT
FINDESIO GICHUNGE M'TUGI.....10TH APPELLANT
SAMWEL KAARIA M'MUGA.....11TH APPELLANT
ANAISIA KATHAMBI CHABARI.....12TH APPELLANT
DORIS GATIRIA.....13TH APPELLANT
M'BASTI NYAGA NTATUA.....14TH APPELLANT
MUTUA MUGAMBI M'REWA.....15TH APPELLANT
JUSTIN GIKUNDI MPUTHIA.....16TH APPELLANT
GIBSON MPUTHIA MUTINDWA.....17TH APPELLANT

VERSUS

MUTUA MUGAMBI M'REWA.....1ST RESPONDENT
DIRECTOR LAND ADJUDICATION AND SETTLEMENT SCHEME.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

A. Introduction

1. This appeal was instituted vide a memorandum of appeal filed in this court on **13.07.2021** and wherein the appellants challenged the ruling of the trial court (Hon. J. M. NJOROGE C.M) delivered on **16.06.2021**.

2. The grounds upon which the appeal is premised are as follows; -

i. That the learned trial magistrate erred in law in failing to review his ruling by allowing a preliminary objection which had no basis in law.

ii. That the learned trial magistrate erred in law and in facts in failing to review a ruling which misconstrued the law in cases based on fraud.

iii. The Learned Magistrate erred in Law in failing to find the land in issue was registered land and therefore could only be determined by a court of law in the manner the plaintiffs approached court.

B. Submissions by the Appellants

3. In their submissions, the appellant submitted that the appeal has merit and ought to be allowed. They submitted that they were aggrieved by the ruling on the preliminary objection dated **27th January 2021** and filed a review dated **10th February 2021** which was dismissed and therefore preferred this appeal.

4. The ruling was to the effect that the Appellants suit was Res-Judicata the tribunals cases before the adjudication process. The appellants aver that their suit was based on section 26 (i) of the Land Registration Act 2012 which states that the title to a proprietor of land cannot be subject to challenge except –

a) on the ground of fraud or misrepresentation to which the person is proved to be a party, or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

5. The appellants contend that the suit is based on fraud and illegal scheme and that their land were given to undeserving people illegally by the 2nd Respondent. They submit that the appellants were not challenging the process of adjudication as stated in the ruling and that if they were challenging the process then they should have gone to the high court to quash those processes. It was their submissions that where a party is challenging denial of ownership especially on fraud nothing can stop him/her from accessing the court like the parties did herein.

6. They submit that setting aside the ruling is necessary as it is based on misconception that the parties were challenging the process whereas the appellants are challenging the fraudulent takeover of their lands.

7. The appellants pointed out that it is worthy to note that the title to the Suit land have already been issued and as such the appellants are challenging the issuance of the title to their land to have the same cancelled as they were issued fraudulently.

C. Submissions by the Respondents

8. The Respondents opposed the appeal and submitted that the appeal is self-defeating. They contend that the main argument by the appellants is that the appeal be allowed and the suit be reinstated for hearing on merit since they were aggrieved by the ruling on the preliminary objection dated the **27th of January 2021** and filed a review dated **10th February 2021** which was dismissed hence preferring this appeal.

9. The respondents submit that nothing has been explained by the appellants on what is to be done after the appeal is allowed as the second Respondent is the land adjudication and settlement officer as stated under cap 283 and 284.

10. The respondents further contend that the appeal is self-defeating as it is alleged that the 1st Respondent is deceased and that it is the reason he is sued as a legal representative. The Respondents submit that this alone dismantles the appeal. The Respondents further submitted that the Appellants cannot eat their cake and have it since they sued the Land Adjudication and Settlement Officer, a confirmation that the land is under Cap 283 and 284 Laws of Kenya. It is submitted that the Appellants have not annexed any document such as a search or copy of title to prove that the parcel of land in question is under the Land Registration Act. That the main prayer in the plaint was cancellation of title and for the same to be distributed to the 17 appellants using unspecified sizes, which the Respondents contend is an amorphous prayer. The Respondent further submit that if the appellants were serious, they could have added the Land Registrar as a Respondent in the matter. The Respondents further submitted that the court was functus officio, adding that the appellants ought to have moved the court by way of Judicial Review.

11. Lastly, the Respondents submit that the suit as filed was not based on fraud, but rather a challenge to a minister's decision and also that the same offends the constitution of Kenya 2010 and should not be entertained by the court. The Respondents added that the verification affidavit is defective because it is not accompanied with the authority to plead from the other Appellants. The Respondents therefore urge the court to dismiss the appeal with costs.

D. Analysis and determination

12. I have considered the Record of Appeal, submissions by counsel and the applicable law. From the Memorandum of Appeal dated **12th July, 2021** and filed in court on **13th July, 2021**, the appeal herein is against the ruling of Honourable J. M. Njoroge, C.M. delivered on **16th June, 2021**. I have perused the record of appeal filed on **1st November, 2021** and I note that the said ruling dated **16th June, 2021** does not form part of the record. It is not clear why the appellants failed to file the said ruling in the record yet it is the subject of appeal herein. It is also not clear whether this omission was due to an inadvertent mistake or a deliberate attempt by the Appellants to mislead the court. The same is however in the original record. Therefore, this court will invoke the inherent jurisdiction of the court as read together with the overriding objective in the Civil Procedure Act and the rules made thereunder as well as Article 159 (2) (d) of the constitution to deal with the appeal as filed.

13. Having considered the record of appeal, the submissions and the law, the issues for determination are whether the application for review was competent and or met the threshold prescribed by the law, and whether the learned magistrate was justified in dismissing the application.

14. Section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. See case of *Otieno, Ragot & Company Advocates –vs- National Bank of Kenya Limited [2020] eKLR*.

15. Section 80 of the Civil Procedure Act provides as follows:

“80. 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 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.”

16. Order 45 rule 1 of the Civil Procedure Rules is in terms:

“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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

17. From the above, the main grounds for review are therefore discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

18. In the instant case, the application for review was based on the grounds that:

a) The court dealt with the issues in this matter on the wrong basis that the suit land was under cap 283 and 284 when the land is registered under Land Registration Act.

b) The suit land is based on fraud and not a challenge to the minister’s decision.

c) Judicial review cannot apply to issues regarding a registered land, but only on lands still under adjudication.

19. This court has perused the ruling dated **14th October, 2020** which was the subject of the application for review. I note that in the said ruling, the learned magistrate captured the pleadings as set out in the plaint. Specifically, the learned magistrate stated inter alia, that in the plaint, the applicants sought orders for cancellation of title of L.R. No. L/EAST MAGUTUNI/2266 based on alleged fraud. The court further noted that the appellants had laid down the particulars of fraud. The learned magistrate also pointed out that the parties were in agreement that the dispute was heard under cap 283 and 284 and that the decision of the minister is final, but an aggrieved party can challenge the minister’s decision by way of Judicial Review. In dismissing the application, the learned magistrate found that the court lacked jurisdiction to re-open a decision of the minister.

20. In dismissing the application for review, the learned magistrate found that the appellants had failed to establish the existence of any grounds provided under Order 45 rule 1 of the Civil Procedure Rules. The court also held that the application for review was lodged after a period of about four (4) months, thus failing the test under order 45 rule 1 which requires that such application be made without unreasonable delay. The court further held that the appellants had not explained the delay. The learned magistrate concluded by holding that the court was functus officio, and the only recourse for the applicants was to appeal.

21. From the submissions, it is clear that the appellants’ complaint was that the magistrate made an error in his decision of **14th October, 2020**. If that be the case, and I find it so, then the appellants should have pursued an appeal and not an application for review. From the

material on record, it is clear that application for review as presented could not succeed. In the case of Otieno, Ragot & Co. Advocates –vs- National Bank of Kenya (supra), the Court of Appeal held as follows:

“An application for review must be specific on the grounds on which it is brought. And if the complaint was that the Judge made an error, then he should have pursued an appeal which it had already commenced. Clearly then the learned Judge fell into error when he allowed the application for review based on an inadvertent error or mistake on the part of the Respondent yet the Respondent itself had disclosed that it was an error on the part of the court.”

22. For all the foregoing reasons, I am satisfied that the application for review was bereft of merit and the learned magistrate rightly dismissed the same for the simple reason that it failed to meet the threshold prescribed by law.

23. The upshot is that the appeal is devoid of merit. I do find that the learned magistrate correctly analyzed the appellants’ application for review and I find no basis to interfere with the ruling. In the result, I find no merit in the appellants’ appeal and the same is hereby dismissed. The 1st Respondent shall have the costs of the Appeal to be borne by the Appellants jointly and severally.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF FEBRUARY, 2022 IN THE PRESENCE OF:

CA: Martha

Ms. David for 1st Respondent

Nyaga h/b for Kimathi Kiara for Appellants

N/A for 2nd & 3rd Respondents

C. K. YANO,

JUDGE.