Muloki & another v Mathuku & 2 others (Administrators of the Estate of Stephen Mathuku Kavuu (Deceased)) (Environment and Land Appeal 62 of 2019) [2022] KEELC 3581 (KLR) (4 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3581 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL 62 OF 2019

A NYUKURI, J

MAY 4, 2022

BETWEEN

HERMAN MUSEMBI MULOKI ..... 1ST APPELLANT

PATRICK MALAKI MUTUKU ALIAS BABU MUTUKU ..... 2ND APPELLANT

AND

NDINDA MATHUKU ..... 1ST RESPONDENT

JOEL NZIOKA MATHUKU ..... 2ND RESPONDENT

SAMMY KITUSA MATHUKU ..... 3RD RESPONDENT

ADMINISTRATORS OF THE ESTATE OF STEPHEN MATHUKU KAVUU (DECEASED)

((Being an Appeal from the ruling of Hon. D. Orimba Senior Principal Magistrate Kangundo Law Courts in Kangundo Civil Case No.229 0f 2008))

JUDGMENT

Introduction

1. There have been 3 suits between the Appellants and the Respondents namely Kangundo SPMCC No. 229 of 2008, Kangundo SPMCC No. 149 of 2015 and Machakos P & A Cause No. 25 of 2006 over ownership of plot number 27 Nguluni Market; all of which were determined in the Respondents' favour.

2. This appeal however, arises from a ruling delivered on 4th December 2019 in Kangundo SPMCC No. 229 of 2008, which decision dismissed the Appellant's application dated 24th July 2019, that had

sought for review of the judgment of that court on account of discovery of new evidence and that the court failed to determine the Appellants' Preliminary objection dated 2nd April 2019.

Background

3. The background of this matter is that the Respondents who are widow and sons respectively of the late Stephen Mathuku Kavuu filed Succession Cause Machakos HCC P & A No. 25 of 2006. Among the properties listed as belonging to the estate of the deceased was plot Number 27 Nguluni Market (herein after referred to as the suit property). Being the Administrators of the deceased's estate, they obtained a grant which was confirmed on 10th March 2008.

4. Armed with the certificate of grant, on 18th December 2008, the Respondents, filed a plaint dated 20th November 2008, in the Resident Magistrates Court at Kang'undo being case number 229 of 2008, against the Appellants, seeking for orders to declare that the suit property belonged to the estate of the late Stephen Mathuku Kavuu, eviction orders, *mesne profits*, costs and interest. Their claim was anchored on grounds that the late Stephen Mathuku Kavuu was the registered proprietor of the suit property and that in 1997, without any colour of right or lawful justification, the Appellants entered the suit premises and started carrying on business thereon, and refused to vacate despite demand from the plaintiffs.

5. The suit was opposed and the Defendants vide an amended defence stated that they were *bona fide* purchasers of the suit property, had developed the same in 1959 and 1995 respectively and have been in occupation since then. In the amended defence jurisdiction of the court was admitted.

6. While Kangundo SPMCC No. 229 of 2008 was pending, the Appellants herein filed application dated 10th May 2011, in Machakos High Court P & A, Cause No. 25 of 2006, seeking for revocation of the grant issued to the Respondents, on grounds that inclusion of the suit property as part of the estate of the deceased, was fraudulent as the Respondents herein concealed the fact that the suit property was jointly owned by the deceased and one Stephen Nzuki Luli. The Appellants stated in that court that the latter sold the plot to one Kituku Kiala at a sum of Kshs 330 in 1955 and 1956. That the plot was divided into two, the 1st Appellant developed one part while one part was sold to the 2nd Appellant. The court heard the application and dismissed the same on 19th March 2015, on grounds that none of the Appellants herein exhibited any sale agreements from the deceased either directly or through any other purchaser who purchased the suit property from the deceased. This was because the 1st Appellant did not produce any agreement to show purchase, while the 2nd Appellant's application showed that he purchased plot number 27B from one Joseph Munyao Mbuvi and not the deceased.

7. In 2015, the Appellants filed Kangundo SPMCC No. 149 of 2015, against the Respondents claiming for a declaration that the suit property belonged to them. The record shows that the same was stayed on 20th June 2018, for being *sub judice*, in view of Kangundo SPMCC No. 229 of 2008.

8. Therefore, the court proceeded with Kangundo SPMCC No. 229 of 2008. The matter came up severally for hearing but for one reason or another it was adjourned. On 23rd November 2018, when the matter came up for hearing, Mr. Akonya held brief for Mr. Nzaku for the Plaintiff and proceeded with the matter, where two Plaintiff's witnesses testified and closed their case. As the matter was pending defence hearing, the defendants through their new counsel Ndemo Mokaya & Company Advocates filed a preliminary objection on 2nd April 2019 dated the same date, in which he contended that the suit should be struck out for being filed out of time contrary to section 7 of the *Limitation of Actions Act*. On 3rd April 2019, the matter came up for defence hearing, whereof the Defendants two witnesses testified and closed their case. On 24th April 2019, the Defendants filed an application dated 24th April 2019 seeking for leave to file a list of documents before parties could file their final submissions.

9. Upon hearing the case, on 10th July 2019, the learned trial magistrate delivered a judgment where he stated as follows;

> "It is therefore clear that the Plaintiffs are the registered owners of the suit property. This court has also to determine whether there is need to issue eviction orders to the defendants and or their agents or servants who are currently occupying the suit property.
>
> After considering the evidence adduced before this court, it is clear that the ownership of the suit property has been determined. The law is very clear that ownership can only be determined by document which according to me has been done by the Plaintiff.
>
> According to section 6 of the *Land Registration Act*, the Certificate of title is a *prima facie* evidence of ownership and cannot be challenged except on grounds of fraud or where it is shown where the title has been illegally acquired through corruption. The defendants have not alleged any fraud in acquisition of the title."

10. On 24th July 2019, the Defendants filed an application dated the even date and sought for review of the court's judgment and that the preliminary objection dated 2nd April 2019 be determined. The defendants also sought for leave to adduce new evidence. They argued that, though the trial magistrate had entered judgment for the plaintiff, the court had ignored the fact that the Defendant had filed a preliminary objection dated 2nd April 2019; that the court directed that submissions in respect of the preliminary objection be filed together with the final submissions in respect of the suit. Further, that the Defendant was aggrieved that the judgment did not address the Preliminary Objection; that the Defendant had recently come in to possession of a receipt for transfer from the Town Council of Kangundo as well as a letter from the local chief about the suit property; that the Defendants also came in to possession of sale agreements for the purchase of the suit property and tried to adduce them vide his application dated 24th April 2019 in vain and that at trial, they were not aware of the existence of those documents.

11. That application dated 24th July 2019 was opposed by the Plaintiffs who filed a Replying affidavit sworn on 27th August 2019 and filed on 29th August 2019. The Plaintiffs stated that the application was an afterthought and made in bad faith; that this suit was partly heard when the Defendant filed Kangundo SPMCC case number 149 of 2015, which suit was stayed for being *sub judice*; that in 2006 the Plaintiffs had filed a Succession Cause No. 25 of 2006, where the defendants sought for revocation of the grant, but the application was dismissed. They further stated that the issue of ownership of the suit property between the plaintiffs and the Defendants was *res judicata* as the High court had already determined the same, and the court stated that the sale agreements produced did not demonstrate that there was an agreement between the Plaintiff's father and the defendants; that the agreements attached do not bear the deceased's signature neither do they show that there were any payments made to the deceased in respect of the suit land; that the Preliminary Objection was an afterthought as it came after the plaintiffs had testified and closed their case; that in both the defence and amended defence there was no objection to the jurisdiction of the court and even when the First Plaintiff testified on 15th April 2010, no objection on limitation was raised; that the suit was not barred by limitation as the Defendants started claiming ownership of the plot in 1997 while the suit was filed in 2008, which is less than the 12 years' statutory period. That after the close of the plaintiffs' case the applicants filed three applications dated; 26th March 2019, 2nd April 2019, and 24th April 2019; which applications were all disallowed. Further, that there were no directions for the hearing of the preliminary objection; that annexure Tmm-3 is a forgery as the time which the deceased was said to have paid the transfer amount in 2005, he was already dead having died on 25th June 1989. That the letter by the chief was written

when this matter was already in court and therefore, no explanation was given why it was not filed in court, nor the chief called to testify; that the sale agreements intended to be produced are the same agreements filed in succession cause No 25 of 2006 and Civil suit no. 149 of 2015, where the court has pronounced itself on those agreements to the effect that, they do not point to the late Stephen Mathuku Kavuu as being the vendor; hence the said agreements were not filed in this suit in view of the courts holding on the same and that the suit land was transferred to the Plaintiffs on determination of Succession Cause Number 25 of 2006.

12. That application was heard and the learned trial magistrate in his ruling dated 4th December 2019 held as follows;

> " The issue before me is whether or not the defendant ought to be allowed to introduce the new evidence and reopen the case where a judgment had been entered. It will be noted that prior to the filing of supplementary lists of witnesses and documents, the plaintiff has already presented their witnesses and closed their case. The Defendant has also testified and closed his case. The judgment was entered after a due process was done.
>
> The *Civil Procedure Rules of 2010* require parties to furnish their evidence in advance before the commencement of the trial. These provisions are found in Order 3, order 7 and Order 11 of the *Civil Procedure Rules* under Order 3 Rule 2.
>
> When filing suit, one needs also to file a verifying affidavit, list of witnesses (excluding expert witnesses) and copies of documents to be relied upon at the trial.
>
> ..It is clear from the above that both plaintiffs and defendants are supposed to furnish their evidence when filing their pleadings. It is also with the leave of the court that the documents may be supplied later, but this needs to be done at least 15 days before the pretrial conference through a mention where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.
>
> There is no provision in the *Rules* that permits the court to accept a list of witnesses or documents filed outside the timelines provided in Order 3 Rule 7 and Order 7 Rule 5
>
> The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party the nature of the evidence that he will face at the trial.
>
> The court has a constitutional mandate to ensure that the trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules.
>
> When the Plaintiff testified and tendered their evidence, they had in mind that all that the defendant would not be relying on any other document. The document sought to be introduced was not in their contemplation. They were never cross examined on it. They never thought fit to mention it, assuming they knew of its existence.
>
> Before the Defendant started giving evidence, he never gave any indication that he would be relying on the subject documents. When the defendant testified he never alluded the document sought to be introduced. It is only after the judgment was delivered now that he sought to reopen the case which has been pending for the last 11 years in court. Litigation must come to an end.
>
> It will be unfair to the plaintiff if I have to allow the defendant at this late state to reopen the matter.

In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50 (1) of the *Constitution*."

13. The Appellant being dissatisfied with the above decision filed this appeal vide the Memorandum of Appeal dated 18th December 2019 and filed on the even date, which enumerated 11 Grounds of Appeal as follows; -

    a. The learned Magistrate erred in law and in fact by dismissing with costs the Appellants application for review dated 24th July, 2019.

    b. The learned Magistrate erred in law and in fact by failing to allow the Appellants Preliminary Objection dated 2nd April, 2019 despite the Respondents failing to file a Replying Affidavit nor Submissions to the Preliminary Objection.

    c. The learned Magistrate erred in law and in fact by failing to take into consideration a copy of payment receipt from the former Town Council Kangundo evidencing payment of Transfer fees on the property from the Respondents to the 1st Appellant.

    d. The learned Magistrate erred in fact and in law by not taking into consideration a letter from the local area chief evidencing local level consultations within the parties' area of residence and location of the suit property.

    e. The learned Magistrate erred in fact and in law by ignoring the fact that the Appellants provided sale agreements relating to the purchase of the properties from the Respondents and never considered the sale agreements.

    f. The learned Magistrate erred in law and in fact by ignoring the contents of the Appellant's Application for review dated 24th July,2019 and the prayers therein.

    g. The learned Magistrate erred in law and in fact by ignoring the Appellant's averments that they were unaware of the existence of the documents.

    h. The learned Magistrate erred in law and in fact by taking irrelevant considerations which were not in issue before the Magistrate Court.

    i. The learned Magistrate erred in law and in fact in ignoring express averments by way of Replying Affidavit made by the Appellant a decision that contradicts the express averments on record.

    j. The learned Magistrate erred in law in ignoring evidence in favour of the Appellant to the detriment and prejudice of the Appellant and manifested bias against the Appellant.

    k. The learned Magistrate erred in law, in fact and in principle by effectively denying the Appellant justice.

14. The Appellants' prayers were that the Appeal be allowed, the Appellants' Preliminary Objection dated 2nd April, 2019 be allowed as prayed, the Ruling and Orders of Hon. D. Orimba made on 4th December, 2019 be set aside, the Appellants/Application for review dated 24th July, 2019 be allowed against the Respondent and the costs of the suit and Appeal be provided for.

15. Besides the Memorandum of Appeal, on 25th November 2020, the Appellant filed a Preliminary Objection against the Respondent's conduct of the instant Appeal on the following grounds; -

a. That, Judgment and Decree from which this Appeal arises is defective in law and should be struck out since the Advocate in conduct of Kangundo Civil Case No. 229 of 2008 by the name Kevin Akonya was not a qualified person as prescribed under the *Advocates Act*.

b. That under Section 31(1) of the *Advocates Act* no unqualified person shall act as an advocate or as such cause any summons or other process to issue, or institute, carry on or defend any suit or any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

c. That, the above named Kevin Akonya was in conduct of Kang'undo Civil Case No. 229 of 2008 on behalf of the Respondent's herein and in that capacity made attendances in court and conducted the proceedings of the matter in the lower court by examining and cross examining the witnesses therein. This is evidenced by the Court Record in Kangundo Civil Case No. 229 of 2008 where his name appears adversely.

d. That the practicing status of the above mentioned Kevin Akonya was confirmed vide a letter dated 12th March, 2020 from the Law Society and signed by the Deputy Secretary Compliance and Ethics which is already in this Honourable Court's Record.

16. On 20th April 2021, the court directed that both the Preliminary Objection and the Appeal be canvassed jointly by way of written submissions. The Appellants filed their submissions on 13th September 2021, while the Respondents filed their submissions on 22nd September 2021.

Appellants' Submissions

17. Counsel for the Appellants submitted that the Appellants had placed before the court a letter dated 12th March, 2020 signed by the Registrar of the Law Society of Kenya clearly stating that the purported Respondents' counsel, during the trial one Mr. Kevin Akonya was an unqualified person as contemplated by the *Advocates Act*. He relied on sections 9 and 31 of the *Advocates Act* to argue that an unqualified person acting as an advocate acts in contempt of court and cannot maintain any suit for costs. He referred the court to the cases of *Mohammed Ashraf Sadique & another v Mathew Oseko t/a Oseko and Co Advocates*, [2009] eKLR, *National Bank of Kenya Limited vs. Anaj Warehousing Limited* [2015] eKLR and *Joseph Orao Obura v Martha Karambu Koome* [2001] eKLR for the proposition that documents prepared or filed by an unqualified advocate are invalid and of no legal effect.

18. It was also contended for the Appellants that the trial court did not make a finding on the Preliminary objection dated 2nd April 2019. They argued that the suit properties were sold between 1955 and 1956 and therefore as the suit was filed on 18th December, 2008, it was over sixty years since any right over the property had accrued. Counsel opined that the trial court lacked jurisdiction to determine the suit before it due to operation of section 7 of the *Limitation of Actions Act*.

19. Counsel submitted that the trial court directed that the Preliminary Objection dated 2nd April 2019 be canvassed together with final submissions in the suit; Counsel stated that it was trite law that a Preliminary Objection can be raised at any time before judgment and must deal with points of law as was held in *Panfield Investment Ltd (New Eldoret Total Service Station Ltd) v Sisibo Luxury Shuttle Ltd* [2018] eKLR. It was submitted for the Appellant that the suit property was purchased in 1955 as evidenced by the agreement on record, and that the Respondents have never denied the existence of those agreements. Counsel referred the court to the case of *E. Togbor vs. Ladislaus Odongo Ojuok* [2015] eKLR, where it was held that where a cause of action is statute barred, a court has no jurisdiction to deal with the matter.

20. As regards the grounds of appeal in the Memorandum of Appeal, counsel submitted that the learned trial Magistrate relied on the decision of Thuranira J. in Succession cause No. 25 of 2006 in deciding the suit in favour of the Respondents herein, and therefore the judgment is defective and lacks legal backing. Counsel placed reliance on the reasoning in the case *Mbula Muoki Ndolo & Another v Kenya Power and Lighting Company Limited* for the proposition that that dispute between an owner of land and an occupier of the land is outside the jurisdiction of the succession court and should be pursued in the Environment and Land Court.

21. On whether the Appellants' application for review was merited, Counsel referred the court to Order 45 Rule 1 of the *Civil Procedure Rules 2010* that provides for valid grounds to warrant orders of review. They Submitted that the documents sought to be produced were not within the knowledge of the Appellants during trial of the matter in the court below. They argued that the Appellants had discovered new evidence and they ought to be allowed to produce the same in court. That although attached transfer fees receipt was said to be forgery, that the authenticity of the documents is a matter to be established during trial after this court orders a retrial and not an issue for this court.

22. Counsel submitted further that each appellant owned different properties of the same property. It was their averment that they each acquired those properties separately. Further that their application to have the sale agreements adopted by the trial court vide their Notice of Motion application dated 24th April, 2019 was denied.

23. Counsel finally submitted that the local area chief in a bid to resolve this dispute called for a consultative meeting and heard both parties. That the chief subsequently wrote a letter of recommendation based on the findings of the consultative meeting. Counsel further averred that both parties to the transactions have since died and therefore it was important that the chief is allowed to testify in this matter as he is well versed with the issue.

Respondents' Submissions

24. Counsel for the Respondents submitted in regard to the Preliminary Objection, that it was improper for the Appellant to file an Appeal in court and thereafter file a preliminary objection on his own appeal on allegations that one of the advocates that held brief for the Respondent's counsel was unqualified person. He termed this "throwing it all to the wall to see what sticks and a "my way or the highway" attitude on the part of the Appellant. On the Preliminary Objection, counsel submitted that the Preliminary objection introduced issues that were totally unrelated to their appeal and which were never canvassed in the lower court. Counsel argued that the Preliminary Objection was bad in law since the matter before this court had been in the lower court for 13 years and at no point during the entire 13 years had the appellants ever raised an issue regarding any advocate that has ever appeared during the said 13 years. That the same has also not been challenged in the appeal and that the same were merely fishing expedition as the issues raised were an afterthought, those issues were never raised before the lower court and that they were never raised in the appeal.

25. Counsel referred to the case of *Richard Muthusi v Patrick Gituma Ngomo & Another* [2017] eKLR; where the court cited with approval the decision in the case of *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others* Nairobi (Milimani) HCC No. 363 of 2009, where it was stated that the court has an inherent jurisdiction to preserve the integrity of the judicial process and to guard against abuse of the court process by parties.

26. In regard to the grounds of appeal, counsel submitted that the Appellants' application for review does not meet the threshold for an order for review. Counsel argued that there are irreducible minimums

in so far as review orders are concerned and placed reliance on the case of *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR.

27. Counsel observed that the grounds for review stipulated in the application dated 24th July 2019 could not meet the threshold for grant of review orders.

28. Counsel submitted further that the review application before the lower court sought to introduce new evidence never available during the trial, that the receipts of the transfer allegedly signed by the deceased, 16 years after his death since in their application for review, they filed a receipt dated 28th December, 2005, yet the deceased as per the death certificate passed on on 25th June, 1989.

29. Counsel further Submitted that the Preliminary objection was filed when the matter was coming up for defence hearing, 11 years after the case had commenced as the 1st Respondent had already testified on 15th April 2010. Counsel wondered why the Appellants proceeded with the defence hearing and failed to argue the Preliminary objection or seek directions in respect of the same if indeed they intended to prosecute the Preliminary objection. Counsel observed that contrary to the Appellants' Submissions that the court directed that the Preliminary objection was to be determined in the main judgment, no such directions were made. Counsel argued that it was the duty of the Appellants to move the court on the Preliminary objection and prosecute the same.

30. On the question of Limitation, counsel argued that the issue never arose in the lower court as the Appellants started claiming the suit property in 1997, while the suit was filed on 10th December 2008, which period was less than 12 years.

31. It was also contended for the Respondents that as regards the letter from the chief, the same did not fall within the ambit for review as the chief was merely interfering with the jurisdiction of the lower court by trying to determine a matter which the lower court was trying. Counsel submitted that the area chief was also not a witness and never came to court to testify on his document. On the issue of the agreements, counsel submitted that the same were being introduced at the point of defence hearing many years after the 1st Respondent had been heard.

32. On whether the Appellants can be allowed to challenge the issues regarding the merits of the Judgment they never appealed against counsel submitted that the Appellants opted for a review as opposed to an Appeal. Counsel relied on the case of *Serephen Nyarangi Menge* [2018] eKLR where it was held that;-

> ....the applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somewhat must come to an end and for the applicant the end came when she applied for review and appealed the reason made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto, the court rendered itself on the basis of law and evidence.

Analysis and Determination

33. Having noted that the record of appeal was incomplete as some of the proceedings and pleadings referred to by the Appellants in faulting the trial court's decision were not part of the record of appeal prepared by the Appellants; on 23rd November 2021, this court ordered the Appellants to file a supplementary record of appeal to include the entire proceedings as well as the pleadings of the lower court. However, the Appellants did not comply. Nevertheless, I have had opportunity to consider the pleadings and the entire proceedings of the trial court from the original court file. I have also considered the Memorandum of Appeal, the record of appeal, submissions, authorities cited, the

Notice of Preliminary Objection filed before this court and all the material on record before the court below and before this court. I note that this being a first appeal, the role of this court is to subject the material before the trial court to a fresh analysis so as to reach an independent conclusion and at the same time evaluate whether or not the conclusions arrived at by the trial court were justified. See the case of *Selle vs Associated Motor Boat Co.* [1986] EA 123.

34. In this appeal, besides the Memorandum of Appeal, the Appellants also filed a Notice of Preliminary Objection dated 24th November 2020. In the said Preliminary Objection, the Appellants state that they "shall raise a preliminary objection against the Respondent's conduct of the instant appeal." They have raised the issue that the trial in the lower court was conducted by Mr. Kevin Akonya who was not a qualified person to act as an advocate. On that basis, they have sought for prayers as follows;

> " Reasons wherefore the Defendants/Applicants pray that judgment and decree from which this appeal arises be declared as defective, null and void, and unlawful and should be set aside and rendered nugatory. Further that the instant appeal be allowed in full and with costs since the advocate in conduct of Kangundo Civil Case No. 229 of 2008 by the name Kevin Akonya was not a qualified person as prescribed under the *Advocates Act*."

35. Clearly, by this appeal the Appellants want to kill two birds with one stone. By way of the preliminary objection, they are seeking to reverse the judgment of the lower court which they unsuccessfully sought to review. And by the Memorandum of Appeal herein, they seek to appeal against the orders refusing to grant review of the lower court judgment. In short, the Appellants are using this appeal to appeal against both the lower court judgment and the order denying them review orders against the same judgment. It is however, my considered view that the approach taken by the Appellants is untenable in law.

36. The substratum of this appeal is the order dismissing the application dated 24th July 2019. The issue as to whether Mr. Kelvin Akonya was authorized in law to represent the Respondents has never arisen before the lower court either during trial of the main suit or in the application for review dated 24th July 2019. I am in agreement with the Respondents' submissions that the Preliminary Objection is nothing but a fishing expedition on the part of the Appellants as they have not demonstrated any nexus between the issues raised in the preliminary objection and the appeal. In addition, what this court has been called upon to interrogate in this appeal, is whether or not the application dated 24th July 2019 met the threshold for grant of review orders and whether the decision arrived at by the lower court was justified.

37. Besides, the evidence as to whether Mr. Kelvin Akonya was authorized to practice is not before this court, was not presented in the trial before the court below and was not availed for interrogation in the application dated 24th July 2019. As earlier observed, this appeal cannot be a vehicle that can be used to obtain the orders sought in the Preliminary Objection. Simply put, the Appellants' Preliminary Objection is nothing but an appeal against the Judgment of the lower court through the back door. While parties and counsel are encouraged to be innovative in terms of growing our indigenous jurisprudence, I do not think that that would encompass disregarding basic legal tenets, and certainly not raising a preliminary objection in one's own appeal.

38. In addition, a preliminary objection can only be raised on pure points of law and cannot be based on disputed facts. (See *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696). The issue as to whether Mr. Kelvin Akonya was authorized to practice law is a matter that calls for proof by evidence. It is therefore my finding that the Preliminary objection raised herein, is an abuse of the due process, lacks merit and the same is dismissed with costs.

39. As regards the Appeal, the issue that fall for my consideration is whether the learned trial magistrate exercised his discretion properly in dismissing the application for review of his judgment.

40. The jurisdiction of the court to grant review orders is provided for in Section 80 of the *Civil Procedure Act* as well as Order 45 Rule (1) of the *Civil Procedure Rules* as follows;

Section 80 of the *Civil Procedure Act* provides that;

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:

> Application for review of decree or order
>
> (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.

41. In the case of *Nabiswa Wakenya Moses v University of Nairobi & Another* [2019] eKLR the court observed that;

> " Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds;
>
> a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
>
> b) on account of some mistake or error apparent on the face of the record, or;
>
> c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

42. In Civil Appeal No. 2111 of 1996, *National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

> 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 argument to be established.

43. In the case of *Nabiswa Wakenya Moses v University of Nairobi & Another* (*supra*), the court also held that any other sufficient reason for the purposes of review, refers to grounds analogous to the other two grounds, that is an error on the face of the record and discovery of new matter.

44. While in the case of *Ushago Diani Investment Limited v Jabeen Mana Abdulwahab* [2019] eKLR, the Court of Appeal cited with approval the reasoning in the case of *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR, where the court held as follows;

> It is a general principle of law that a court after passing judgment becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.

45. Similarly, in the case of *Benjoh Amalgamated Limited vs Kenya Commercial Bank Limited* [2014] eKLR, the court stated that the residual jurisdiction of the court to review its own decisions

> " should be invoked with circumspection."

46. Jurisprudence on review orders therefore, point to the position that once a court has made a decision on merit, it ought not revisit the matter if the challenge is on merit. However, the court's power to review is limited and ought to be exercised cautiously, scrupulously and judiciously, only to the extent allowed by law. Therefore, vigilance ought to be applied by the court to shut out parties keen on abusing the court process simply to have a second bite at the cherry. The law has provided clear beacons for the instances where review orders can be granted. They are discretionary orders which may only be granted where the applicant demonstrates discovery of new and important matter that they could not produce even upon exercise of due diligence, or because there is an error apparent on the face of the record or for sufficient cause. In addition, the application for review must be made without undue delay.

47. In the instant case, the Appellants' reasons for seeking for orders of review of judgment were two-fold; that they had discovered new evidence and that the trial court did not render itself on the preliminary objection dated 2nd April 2019.

48. In the case of *Stephen Wanyoike Kinuthia (Suing on behalf of Juhn Kinuthia Marega (deceased) v Kariuki Marega & Another* [2018] eKLR, on the issue of discovery of new evidence, the court held as follows;

> 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.

49. For a party to succeed on allegation of discovery of new and important matter or evidence, they must satisfy the court that they could not have discovered that matter even with application of due diligence, that the matter discovered is new and that the matter is important. In my view, it is not enough that the matter is new, it must be important to the issues at hand and have a significant bearing on the suit.

50. In the instant matter, the Appellants stated that they had discovered three pieces of new evidence, namely; a copy of a receipt from the former Town Council of Kangundo showing payment of transfer

fees by the Respondent's father dated 28th December 2005, a letter from their area Chief dated 24th April 2019 and sale agreements. While they attached to the application for review, the copies of the receipt from Kangundo Town Council and the chief's letter respectively, they did not attach the agreements referred to, only stating that they tried to adduce the agreements in their application dated 24th April 2019.

51. I have perused the proceedings before the trial court as regards the application dated 24th April 2019, whereof the alleged agreements were attached. The record shows that on 22nd May 2019, Counsel for the Appellant sought to withdraw the said application with no order as to costs, which application was allowed by the trial court. Those proceedings were not included in the record of appeal, neither was a supplementary record filed, even though an order of this court to have a supplementary record filed to include all pleadings and proceedings in the lower court, was made. It is my finding therefore that the issue of the agreements being new and important evidence does not arise, as the same were in the Appellants' possession before judgment was entered and he did not seek to produce them when he had the opportunity.

52. On the issue of the receipt dated 28th December 2005 from the Town Council of Kangundo, purportedly issued to the Respondent's father, the Respondents stated that the latter had already died 16 years before the receipt was issued and therefore the same was a forgery. The allegation that the Respondent's father had died on an earlier date was not rebutted by the Appellant, who responded that the court ought to have admitted the receipt first before interrogating its genuineness. I do not agree with this proposition, as when the court is exercising its power of review in respect of a new and important matter or evidence, it must be satisfied that the matter is not just new but also important to the issues at hand. How can a receipt be important when it is not just its genuineness that is in question, but also when the fact that the payment indicated therein was made by a person who had died 16 years earlier, has not been challenged? It is my finding that at the point of interrogation of the importance of a new document, the court exercising its power of review is within its mandate to interrogate its genuineness. The new evidence ought to have a degree of credibility even where that credibility is contested. Where it is clear that the new evidence is forged, it would be an inefficient use of court's resources to admit a document, which the applicant has not rebutted evidence that such document is a forgery. I therefore find that the trial court did not err by its findings on the genuineness of the receipt from the Town Council of Kangundo.

53. As regards the letter from the chief, the Appellants indicate that the author thereof was their area chief. The Appellant has not bothered to offer any explanation as to why they could not, with due diligence obtain a letter from their own area chief, before judgment was made. I have looked at the said letter and it merely expresses the chief's opinion over the matter that was at the time of writing the letter, pending before the trial court. It does not, in my considered view amount to new evidence that would have had any bearing on the issues pending before the trial court. I have no doubt in my mind that the said letter does not pass the threshold of important matter or evidence. A chief as any other person is entitled to their opinion and the court was not bound to rely on the said opinion in deciding the matter.

54. In the premises, the totality of my analysis point to the inescapable conclusion that what the Appellants indicate to be new matter in my considered view, cannot pass the threshold of being termed as important and new evidence. I therefore find and hold that the contention that the Appellants' documents raised new and important matters or evidence, as lacking merit and that ground must fail.

55. The other limb of the appeal is that the trial court failed to address its mind to the Appellants' Preliminary Objection dated 2nd April 2019. The preliminary objection was to the effect that the suit was filed out of time in contravention of section 7 of the *Limitation of Actions Act* and ought to be struck out. I note from page 15 of the record that the Preliminary Objection was filed in court

on 2nd April 2019 and served upon the Respondents' counsel on 3rd April 2019. This was after the Respondents had closed their case and the matter had already been scheduled for defence hearing for 3rd April 2019. The record shows that on 3rd April 2019, Mr. Oyunge, counsel for the Defendants then, informed court that he was ready to proceed with defence hearing. It is strange that the Appellants' counsel did not mention to court as having filed the Preliminary Objection the previous day or indicate his intention to prosecute the said Preliminary Objection, in view of the fact that he had served the same on the Respondents on the same date of 3rd April 2019. Indeed, on 3rd April 2019, he presented two defence witnesses who testified and thereafter proceeded to close the defence case. The Appellants' counsel's contention that the court directed that the Preliminary objection shall be dealt with in the judgment is misleading and nothing on record supports that allegation. It is clear that the existence of the Preliminary Objection was not brought to the court's attention and no directions were given by the trial court concerning the hearing of the Preliminary Objection and therefore the same was not prosecuted by the Appellants.

56. It is therefore clear that the Preliminary Objection was not prosecuted, but the same was abandoned, without even informing the court that the same had been filed and abandoned. Consequently, by conduct, the Appellants deliberately failed to seize the court's jurisdiction in so far as the Preliminary Objection was concerned and therefore their complaint that the Preliminary Objection was not determined is baseless and dishonest. Without obtaining directions and prosecuting the Preliminary Objection, the Respondents could not be required to address the issues raised in the Preliminary objection. It is apparent that the Appellants' strategy was to keep the Preliminary Objection as a hidden weapon to be used when need arises. Of course, the need arose when judgment in the lower court was entered in favour of the Respondents. Today, unlike in the days of old, the law frowns upon the conduct of parties using trump cards against their opponents. A party must lay bare all their arsenals before the court as well as their opponents way before commencement of trial.

57. Allowing the Appellant to prosecute a Preliminary Objection before this court, which he deliberately failed to prosecute in the lower court would be allowing them to litigate in instalments with the consequence of letting them steal a march on the Respondents. Parties and their counsel are bound under Section 1A (3) of the *Civil Procedure Act* to assist the court to further the overriding objective of facilitating just, expeditious, proportionate and affordable resolution of civil disputes. In that respect, the Appellants together with their counsel failed to assist the trial court by failing to disclose the pendency of the Preliminary objection when the matter came up for defence hearing and therefore cannot be allowed to benefit from this mischief. An attempt to prosecute the Objection through this appeal smacks of bad faith on the part of the Appellants.

58. Besides, I have considered the pleadings to establish whether the question of limitation was raised, but I note that the same was not raised. What I see is that the plaint filed in 2008 stated that the defendants' entry on the suit property was in 1997, while the defence stated that the defendants' entry thereon was in 1955. Nevertheless, limitation was not an issue and in both the original defence and the amended defence, jurisdiction was not disputed. With this apparent contradiction in the pleadings, and the silence on the question of limitation, it cannot be established from the pleadings that the suit was filed out of time, considering that a suit for recovery of land ought to be filed within 12 years as per the provisions of section 7 of the *Limitation of Actions Act*. Therefore, according to the Plaint, the suit was filed after 11 years after the accrual of the cause of action, but according to the defence, the cause of action accrued 42 years earlier.

59. Therefore, the question of limitation if it were to be raised, was a matter to be proved by the Defendant, because it is trite law as provided for in section 107 of the *Evidence Act*, that he who alleges must prove. Evidence on record by the defence does not disclose that they entered the suit property earlier than the

date given by the Plaintiffs, neither does the said evidence raise the question of limitation as a matter that the court ought to have addressed its mind upon. The Defendants did not even bother to produce the land sale agreements upon which they state that their entry on the suit property was premised.

60. It is my finding therefore that the preliminary objection was not prosecuted by the Appellants and hence the trial court was not seized of the question as to whether the suit was time barred. I also find that in any event, there was no evidence to support the contested proposition in the Preliminary Objection to the effect that the cause of action arose in 1955.

61. The upshot is that this appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Muriithi holding brief for Mr. Nzaku for the Respondent

Mr. Oyunje for the Appellant

Ms Josephine Misigo – Court Assistant