



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KAJIADO
ELC. APPEAL NO. 3 OF 2020

(Formerly Nairobi ELC Appeal No. 85 of 2015)

NDUNGU THIONGO.....APPELLANT

VERSUS

GODFREY KIHUHA GICHUHI & MOSES MUIRU GICHUHI (Administrators
of Estate of MICHAEL GICHUHI MUIRU.....RESPONDENT

JUDGEMENT

(Being an Appeal from the ruling of Hon. P. A. Olenga- (P.M) delivered on 3rd May, 2012 in Kajiado SRM Civil Case No. 364 of 2002)

By an amended Memorandum of Appeal dated the 9th March, 2020 and filed on 11th March, 2020, the Appellant (Defendant) appealed against the ruling delivered on 3rd May, 2012 by Hon. P.A. Olenga (P.M), based at Chief Magistrate's Court at Kajiado. The genesis of this appeal is the ruling of the trial court dated 3rd May, 2012 which dismissed the Appellant's application by granting the following orders:

- a. That the application be and is hereby dismissed.
- b. That Public Trustee being the administrator of the estate of the Plaintiff's father be and is hereby allowed to take up the matter in order to determine the ownership of the plot in question.

These orders emanated from the Appellant (Defendant)'s Notice of Motion Application dated the 28th May, 2008 and filed on 29th May, 2008 where he sought for the following orders:

- a. That there be a stay of execution of the court judgment pending the hearing of determination of this application.
- b. That the court decree be reviewed and set aside.
- c. That the Defendants name be substituted with the Public Trustees who are the administrators of the deceased estate.
- d. That the costs of this suit be provided for.

The Appellant being dissatisfied by the said ruling of the trial court filed an appeal to the High Court in Nairobi vide High Court Appeal No. 237 of 2012 which was transferred to the Environment and Land Court at Nairobi vide ELC Appeal No. 85 of 2015 and later to this Court. The Memorandum of Appeal contained the following grounds;

1. The learned Principal Magistrate erred and was wrong in failing to appreciate the fact that Appellant (Defendant) occupied the disputed premises as son of the deceased person who originally owned the premises and in so far as the Public Trustee and not the Appellant who was the administrator of the deceased's estate, the appellant had been wrongfully sued.
2. The learned Principal Magistrate erred and was wrong in failing to appreciate the discovery that the Public Trustee and not the Appellant, was the administrator of the deceased's estate was a new and imperial important matter to be considered in terms of the provisions of Section 80 of the Civil Procedure Act and Order XLIV (ii) of the Civil Procedure Rules and which should have necessitated a review of the judgment.

3. The learned Principal Magistrate erred and wrong in failing to fully analyze and appreciate the legal input effect of paragraph 4,6 and 7 of the Appellant's defence.

4. The learned Principal Magistrate erred and failed to fully analyze and appreciate the nature of the case before him and the issue for determination and consequently fell in error and arrived at a wrong determination of the case.

The Appellant prays that:

a. The appeal be allowed and the orders of the Senior Resident Magistrate given on 3rd May, 2012 be set aside and, in the place, thereof be substituted an Order setting aside the judgment given in Kajiado SRMCC No.364 of 2006 on 6th November,2007.

b. The costs of this appeal be paid for by the Respondent.

The appeal was canvassed by way of written submission.

Appellant's submission

The Appellant submitted that the appeal relates to a suit in the lower court where the Respondent sought for damages and permanent injunction against the Appellant from interfering with the suit property on grounds that he had trespassed thereon and undertook developments. The Appellant (Defendant) sought for dismissal of the Plaint on grounds that he was improperly sued as the suit property belonged to his late father who had put up structures thereon; and since then he has been in possession and maintaining it. He further argued that upon delivery of judgment in favour of the Respondent, the Appellant filed a Notice of Motion application seeking for review of the judgment on grounds that the suit was time barred and that the Public Trustee who was the administrator of the suit property should have been enjoined in the suit. The Appellant argued that the Public Trustee who was appointed as an administrator on 6th November, 1998 in Nairobi High Court Succession Cause No.107 of 1998 should be substituted as the Defendant in the trial court proceedings. He argued that the Respondent in his response stated that the Notice of Motion was unmerited and overtaken by events as the suit property had been attached and sold to recover the costs. Further, the Respondents contended that they purchased the suit property from one Mula Ole Nkuna Kasikau, paid land rates for it, to Olkejuado County Council and therefore the Public Trustee had no rights to administer it. The Appellant submitted that the suit property belonged to his late father who purchased it from Joseph M. Taani. He referred to the Ruling of the trial court and argued that in line with Order 45(1)(b) of the Civil Procedure Rules, there was sufficient cause for the said trial court to review its decisions as it acknowledged the issue of double allocation of the suit property in its ruling. The Appellant relied on Section 3A of the Civil Procedure Act and Order 1 Rule 10 of the Civil Procedure Rules to support his argument that the court should allow the appeal by setting aside the trial court judgment including decree and order that the Public Trustee be made a party to the proceedings.

Respondents Submission

The Respondents submitted that the Appellant's application for review of judgment was made seven months after the same had been delivered. Further, that the application for review was an afterthought since the Appellant declined to testify despite the court granting him a chance to do so. They argued that the trial court ruled that the Appellant was aware that a Public Trustee had been appointed as an administrator of his father's estate in 1998 while the suit in the lower court was filed in 2004 against him and not the estate. They further submitted that the trial court declined to allow the review as the Appellant was non-committal as to when he made the discovery of the issue of the Public Trustee administering his father's estate. They proceeded to argue that the review of judgment can only be made post judgment. Further, the Appellant's prayers for substitution of a party in a suit after judgment has been delivered is inappropriate as there is no law supporting it. They reiterated that the trial court ordered the enjoinder of the Public Trustee into the suit to authenticate the ownership of the suit property. They contended that the issue of double allocation was not stated in the Appellant's application nor was it new. In support of this argument, the Respondents relied on Order 45 Rule (1) of the Civil Procedure Rules and submitted that there is no discovery of new material evidence as parties in the trial court proved ownership. They insisted that no reasons were given by the Appellant on why he delayed in seeking for the review of court decision for seven months and prosecuted the matter after four years. Further the judgment was executed when the Respondents had already evicted the Appellant from the suit property, clearly showing that litigation must come to an end. They further relied on the following decisions: **Stephen Gathua Kimani vs Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR; Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR** to support their averments.

The Appeal was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Amended Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Learned Magistrate erred in law in making the order dated the 3rd May, 2012.
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal?

I will deal with the aforementioned issues jointly. Before I proceed to decide whether the Learned Magistrate erred or not, I wish to provide a background of the Appeal herein. The impugned decision sought to be appealed against is dated the 3rd May, 2012 which arose from the Appellant (Defendant)'s Notice of Motion Application dated 28th May, 2008 and filed on 29th May, 2008. In the said application the Appellant had sought for a stay of execution of the judgement; review and or setting aside of the Decree and substitution of his name with the

Public Trustee who are administrators of the deceased estate. The Court upon hearing the application which was premised on the grounds that the judgement was obtained irregularly, Plaintiff's suit was time barred and the Public Trustee who were administrators of the suit property should be enjoined as Defendant, proceeded to dismiss it and directed that the Public Trustee being the administrator of the estate of the Plaintiff's father to take up the matter so as to determine the ownership of the disputed plot.

The Appellant in the Memorandum of Appeal has contended that the Magistrate erred by failing to grant the application for review and yet there was sufficient reasons to do so since this was a case of double allocation. I note in the proceedings leading to the judgement that was sought to be reviewed, the Appellant failed to testify and adduce evidence in respect to the dispute herein.

I will proceed to make reference to various legal provisions governing review and or setting aside of Court Orders.

Section 80 of the Civil Procedure Act provides: -**"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."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: **' 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.'**

In the case of Pancras T. Swai vs Kenya Breweries Limited [2014] eKLR the court observed that: *'the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law'.*

Further, in the case of *National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR* the Court stated thus: **"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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."**

Further, in the case of *Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR*, the Learned Judge favourably cited the case the **Supreme Court of India in *Ajit Kumar Rath vs State of Orisa & Others*^[5] had this to say:-** **"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilising it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule"**

See also the case of ***Alfred Mincha Ndubi v Standard Limited [2021] eKLR***.

From a reading of the said legal provisions I have cited, it is evident that a party can only seek for review and or setting aside of an order of court from the said Court that passed the previous order. Upon perusal of the application for review and the impugned Ruling, I note the Appellant admitted the Public Trustee was made administrator of the deceased father's estate in 1998 yet the suit was filed in 2004. Further, he did not divulge when he knew the Public Trustee was administering the said property. Further, I note he declined to testify in court and present these facts to the court including laying a basis for his Defence, before the judgement was delivered. Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that the learned Principal Magistrate did not err to hold that the Appellant had not been wrongfully sued. Further, I do not find that the learned Principal Magistrate erred and was wrong in failing to appreciate the discovery that the Public Trustee and not the Appellant, was the administrator of the deceased's estate was a new and imperial important matter to be considered as the said Public Trustee became the Administrator before this suit was filed and the Appellant failed to provide this piece of evidence earlier. On the ground as to whether the learned Principal Magistrate erred and was wrong in failing to fully analyze and appreciate the legal effect of paragraph 4,6 and 7 of the Appellant's defence, I note the Appellant failed to adduce evidence to support these averments in line with section 107 and 108 of the Evidence Act. I hence find that the Learned Principal Magistrate did not err on this point. I further find that the Learned Principal Magistrate indeed appreciated the nature of the case before and made a proper determination by declining to review and or set aside the judgement as the Appellant failed to meet the threshold set for review since he never presented any evidence to controvert the Respondents' averments during the hearing of the main suit in the lower court. To my mind, the Appellant has not demonstrated what sufficient reasons could make the trial magistrate review the said judgement.

It is against the foregoing that I proceed to uphold the Ruling delivered by Hon. P. Olenga delivered on 3rd May, 2012 in Kajiado SRM Civil Case No. 364.

The upshot is that I find this Appeal unmerited and will proceed to dismiss it with costs to the Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF MAY, 2021

CHRISTINE OCHIENG

JUDGE