REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 58 OF 2019

AMIN MOHAMED KHAN.....APPELLANT

VERSUS

MARY MWONJARU CECILIA.....1 ST RESPONDENT

ISAIAH MUTHIKA IKIAO .....2ND RESPONDENT

DANIEL KAILANYA.....3RD RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and an order of Hon. G. Sogomo (PM) dated 4th April, 2019 in *Tigania CM &ELC No. 174 of 2018 - Amin Mohamed Khan v Mary Mwanjaru Cecilia & 2 Others*. By the said ruling, the trial court dismissed the Appellant's application for review dated 24th December, 2018 whereby the Appellant sought a review of the trial court's order dated 13th December, 2018.

2. The material on record indicates that by a notice of motion dated 21st September, 2018, the Appellant sought a temporary injunction restraining the Respondents from entering, occupying or interfering with the Appellant's parcels of land described as **Title Nos. Tigania/Antuamburi/4042 (parcel 4042)** and **11348 (parcel 11348)** and which he contended formed part and parcel of his **Parcel No. 6388.** The Appellant contended that his parcel No. 6388 ought to have measured 0.21 ha but the Land Adjudication Officer (LAO) had wrongfully hived off 0.07 ha and allocated it to the Respondents as parcels Nos. 4042 and 11348.

3. By a ruling dated 13th December 2018, the trial court held that the Appellant had failed to demonstrate a *prima facie case* with a probability of success at the trial within the meaning of the principles enunciated in the case of **Giella v Cassman Brown & Co Ltd [1973] E.A 358.** In particular, the court found that under **Section 16 (2)** of the **Government Proceedings Act (Cap. 40)**, it was precluded from granting an injunction against an officer of the government.

4. It would further appear from the material on record that on 24th December, 2018, the Appellant withdrew the suit against the LAO and the Attorney General and then filed an application for review of the order dated 13th December, 2018 with a view to obtaining the interim injunction sought earlier. The Appellant contended that the concerned government officials had since corrected the acreage on his title document to reflect the genuine acreage of 0.21 ha. He annexed a copy of the amended title deed for Parcel No. 6388 to his supporting affidavit.

5. By a ruling dated 4th April 2019, the trial court dismissed the Appellant's application for review. The trial court held, *inter alia*, that all the parties to the suit held title documents to their respective parcels hence the Appellant had not demonstrated why the court should place a higher premium on his title than those of the Respondents. The court further pointed out that the Respondents' titles actually pre-dated the Appellant's title. The court found, once again, that the Appellant had not demonstrated a *prima facie case* with a probability of success to warrant issuance of an interim injunction.

B. THE GROUNDS OF APPEAL

6. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 11th April, 2019 raising the following grounds of appeal:

(a) The learned trial Magistrate erred in law and fact by failing to find and hold that the Appellant had established all the

conditions for granting a review.

(b) The learned Magistrate erred in law and fact by not considering the Appellant's lengthy supporting affidavit, annextures thereto and submissions.

(c) The learned Magistrate erred in law and fact by dismissing the Appellant's application dated 24th December 2018 unfairly.

(d) The learned Magistrate erred in law and fact by failing to provide any reason as to why he ruled in favour of the Respondents despite their shallow and mixed up submissions.

(e) The learned Magistrate erred in law and fact by relying on extraneous findings and ignoring submissions of the Appellant.

(f) The learned Magistrate erred in law and fact on 4th April 2019 by refusing a stay which had been consented to by both counsels – (open biasness)(sic).

(g) The learned trial Magistrate erred in law and fact by completely failing to apply his judicial mind appropriately under ***Article 159 (2) of the Constitution.***

7. Consequently, the Appellant sought the following reliefs/orders:

(a) That the appeal be allowed with costs.

(b) That the ruling and order of the trial court dated 4th April 2019 be set aside.

(c) That the notice of motion for review dated 24th December 2018 be allowed.

(d) That the main suit be heard by the Magistrates' Court at Meru and not the PM's Court at Tigania.

C. DIRECTIONS ON SUBMISSIONS

8. When the appeal was listed for directions on 2nd September 2020, it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their submissions. The record shows that the Appellant filed his submissions on 1st October, 2020 whereas the Respondents filed theirs on 15th October, 2020.

D. THE ISSUES FOR DETERMINATION

9. Although the Appellant raised 7 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined by resolution of the following issues:

(a) Whether the trial court erred in law in declining to allow the Appellant's application for review dated 24th December 2018.

(b) Whether the Appellant's is entitled to the orders/reliefs sought in the appeal.

(c) Who shall bear costs of the appeal.

E. THE APPLICABLE LEGAL PRINCIPLES

10 There is no doubt that in determining the Appellant's application for review dated 24th December 2018 the trial court was exercising judicial discretion under **Section 80 of the Civil Procedure Act (Cap. 21)** and **Order 45 of the Civil Procedure Rules** *(the Rules).* It has been held that an appellate court should be slow in interfering with the exercise of judicial discretion by the trial court unless it is demonstrated that such discretion was not exercised judiciously or that the trial court acted on wrong principles.

11. In the case of **Mbogo & Another v Shah [1968]EA 93,** it was held, *inter alia*, that:

> **" An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."**

12. There are other decisions from superior courts which have enunciated the same principles on the jurisdiction of an appellate court to interfere with the exercise of judicial discretion by the trial court such as **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR; Apungu Arthur Kibira v IEBC & 3 Others [2019] eKLR and Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

13. In the case of **Apungu Arthur Kibira (supra),** the Supreme Court of Kenya stated as follows at paragraph 39:

> **" We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir (2010)NZSC 112; (2011)2 NLRI (Kacem)* where it was held para 32]:**
>
> > **" In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."**

F. ANALYSIS AND DETERMINATION

a) Whether the trial court erred in law in declining to allow the Appellant's application for review dated 24th December, 2018

14. The court has considered the material and submissions on record on this issue. The Appellant contended that he had satisfied all the requirements for the grant of his application for review under **Order 45 of the Rules.** In particular, the Appellant contended that the issuance of an amended title deed to him constituted "discovery" of new and important matter or evidence to warrant the granting of his application for review. He contended that the new title deed was not in existence at the time his earlier application for injunction was canvassed. The Appellant relied on the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi [2016] eKLR** and **Giella v Cassman Brown & Co Ltd [1973] EA 358** in support of the appeal.

15. The Appellant also faulted the trial court for failing to make reference to the principles governing an application for review and instead concentrated solely on the principles for the grant of an injunction.

16. The Respondents, on the other hand, contended that the appeal had no merit whatsoever since the Appellant had failed to satisfy the requirements for the grant of an interim injunction as well as the application for review before the trial court. The Respondents considered as irregular and unlawful the Land Registrar's decision to cancel the Appellant's original title and issue him with a new title deed for bigger acreage.

17. The legal provisions governing review of an order or decree are set out in **Order 45 of the Rules. Order 45 rule 1** thereof stipulates as follows:

> **"Any person considering himself aggrieved –**
>
> > **(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
> >
> > **(b) By a decree or order from which no appeal is hereby allowed, *and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

18. The said principles for the grant of an application for review were reiterated in the case of **Origo & Another v Mungala [2005] eKLR** where the Court of Appeal held that:

> **"From the foregoing, it is clear that an applicant has to show that there is discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the Applicant must make the application without unreasonable delay..."**

19. The court has noted that the two key grounds for seeking review before the trial court were first, that the Appellant had withdrawn his suit against the Government and secondly, that he had obtained an amended title deed which showed the correct acreage of his parcel of land. The court is far from satisfied that any of those factors would entitle the Appellant to a review of the order dated 13th December, 2018 dismissing his application for injunction.

20. The fact that he could not obtain an order of injunction against the Government did not mean that he would get it against the Respondents as a matter of course. The court is of the opinion that he was still obligated to satisfy the requirements for the grant of an injunction as set out in the case of **Giella v Cassman Brown & Co Ltd (supra).** Similarly, the mere fact that the Land Registrar had, upon his instigation, amended his title deed to reflect a bigger acreage was certainly no ground for review. The Respondents still held titles to their respective parcels which the Land Registrar could not unilaterally cancel or disregard. The court is further of the opinion that there was really no "discovery" of any new or important matter or evidence since all along the Appellant had argued before the trial court that his parcel No. 6388 ought to have measured 0.21 ha. As the trial court put it, the Appellant had not demonstrated why his amended title should carry greater weight and credibility than the Respondents' titles which had been issued much earlier.

21. The court is, therefore, of the opinion that even though the court did not specifically enumerate the principles for review as set out in **Order 45 of the Rules,** the court had them in mind and in fact reached the correct decision on the facts laid before it. There is no evidence on record to demonstrate that the trial court exercised its discretion injudiciously. There is no indication on record to show that the trial court

misdirected itself in law or that it acted upon wrong principles. There is no demonstration that the trial court took into account irrelevant considerations or that it failed to take into account relevant considerations in consequence whereof it reached a wrong decision. The court is thus not satisfied that there is a legitimate reason to interfere with the exercise of discretion by the trial court in declining to allow the Appellant's application for review.

(b) Whether the Appellant is entitled to the reliefs or orders sought in the appeal

22. The Appellant sought various orders in the memorandum of appeal which were all dependent on the conclusion of the appeal in his favour. Since the court has found that there is no merit in the appeal, it would, therefore, follow that the Appellant is not entitled to the said orders, or any one of them. He is also not entitled to have the appeal allowed or his application for review allowed. He is not entitled to have the main suit transferred from Tigania Law Courts to Meru Law Courts for trial and disposal.

(c). Who shall bear the costs of the appeal

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.**The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the Respondents shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

24. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant's appeal is hereby dismissed in its entirety with costs to the Respondents.

It is so decided.

Judgment dated and **signed** in chambers at **Nyahururu** this **20th** day of **May** 2021.

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Y. M. ANGIMA

ELC JUDGE

Judgment delivered at **MERU** this 27th day of May 2021.

In the presence of:

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L. N. MBUGUA

ELC JUDGE