



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 11 OF 2020

JAMES NAMU NYAGA.....APPELLANT

VERSUS

JOHN NYAGA NJOKA.....DEFENDANT

RULING

1. The appeal under consideration arose from the ruling of the lower court at Runyenjes (L.K. Mwenda, SPM) in **SPM No. 65 of 2016**. The ruling was dated 9/5/2019 and was on an application for review dated 10/9/2018. It ended in the dismissal of the application and it is that dismissal that gave rise to this appeal. The application in the lower court sought review of what the applicant called “**decree, judgement, consent and/or order**” which the court had granted earlier in the suit. An order of stay of execution was also sought at the same time.

2. Some background is necessary in order to get a better grasp of the matter. The disputants – **James Namu Nyaga** (now the appellant) – and **John Nyaga Njoka** (now the respondent, or appellee, if you will) – were defendant and plaintiff respectively in the lower court suit. In that suit, the plaintiff had sued the defendant claiming a portion of land from land **parcel No. Kyeni/Mufu/3758** he claimed to have purchased from him and measuring 0.10 Ha. The plaintiff had allegedly paid a substantial amount leaving only a balance of 14,000/-. But the defendant had not fulfilled his part of the bargain.

3. The defendant, who is now the appellant here, does not appear to have filed any defense. Instead, what is on record is a consent dated 27/8/2015 showing him agreeing to transfer the claimed portion to the plaintiff, who is now the respondent. The plaintiff is shown agreeing in the same consent to remove the cumbersome instruments he had placed on the Land Register.

4. But things appear to have taken a different turn shortly after. The appellant is shown to have engaged services of counsel and its clear he wanted to contest the consent. The application for review that was dismissed by the lower court was actually a contestation of the consent. That application was dismissed on 9/5/2019. The dismissal gave rise to this appeal.

5. The appellant cited various grounds in support of the appeal. He faulted the lower court for reasons, *inter alia*, that the suit is sensitive as it is a land matter; failing to find that there were sufficient reasons warranting hearing of the appellant through his lawyer; failing to appreciate that the appellant’s former lawyer had already joined the judiciary; trifling with the issue of representation of the appellant by a lawyer in the case; and failing to appreciate that the application had merits. The appellant would like the appeal to be allowed. He also wants the matter to be heard afresh and would like to get costs both in the lower court and this court.

6. The matter was canvassed by way of written submissions. The appellant’s submissions reiterated the substance of the grounds of appeal. In that regard, the lower court was blamed for not affording a chance to the appellant to call the process server for cross-examination. The court was faulted too for not giving the appellant an opportunity to prepare for his case and engage services of a counsel. He emphasized that he had a right to be heard.

7. According to the appellant, the court should have scrutinized and/or interrogated the disputed consent which was said to have been signed by him.

8. The respondent on the other hand gave a narrative that captured the background of the case and the antecedents surrounding it. He submitted, *inter alia*, that the court was right in dismissing the application. In light of that, this appeal itself was said to be bad in law, incompetent, and therefore requiring dismissal with costs.

9. In a matter like this, the law obligates the court to look at the lower court record, evaluate it itself, and come up with its own findings. I will do precisely that. But even as I do so, it is necessary to say something about the law relating to review. The statutory anchor for that law is found in **Section 80** of the **Civil Procedure Act (Cap. 21)** and **Order 45 of the Civil Procedure Rules, 2010**. **Section 80** is 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 a decree or order from which no appeal is allowed by this Act, may apply for review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.**

10. For our purposes the relevant provisions of **Order 45 of Civil Procedure Rules, 2010**, are to be found in **Rule 1, subrules 1 and 2**, which are as follows:

Order 45(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 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 judgement to the court which passed the decree or made the order without unreasonable delay.**

2) A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to appellate court the case on which he applies for review.

11. In my view, an application for review should confine itself to the scope or ambit of **Order 45 rule 1**. An error apparent on the face of the record should be obvious and/or straightforward. In the case of **National Bank of Kenya Vs Ndungu Njau: Civil Appeal No. 211 of 1996 (1997 eKLR)**, the court held, *inter alia*,

“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 can not be a ground for review.”

12. Where one is applying for review on the ground that he has sufficient reason to do so, the law has been somewhat ambivalent. The judgement of Lord Woolf, CJ, in **Taylor & Another Vs Lawrence and Another [2002] 2 ALL ER 353**, took the view that sufficient reason means reasons that are analogous to mistake or error apparent on the face of the record and/or discovery of new and important matter or evidence. It is the same position one finds in the local case of **Yusuf Vs Nokrach [1971] EA 104**.

13. But a different view is to be found in the case of **Wangechi Kimita & Another Vs Mutahi Wakabiru: C.A No. 80 of 1985 (1985 eKLR)** where the court held thus:

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act.”

14. The preponderant view however is that sufficient reason should be analogous to the other grounds set out in **Order 45 Rules 1 and 2**. The other position is less obvious in our jurisprudence.

15. Applications for review are normally handled with great caution. The court should be careful not to sit in appeal against its own decision in a matter disguised as one for review. It should also take care not to allow the applicant to open completely new fronts in prosecution of his case.

16. I now turn to the application that was before the lower court. In the application before the court, the appellant herein complained of being denied the right of representation by counsel. He also complained of being blamed for not serving some *exparte* orders. It appears also to be his position that he was denied the right to be heard. He had other weighty grievances too.

17. The court heard his application and agreed with the respondents counsel that no mistake or error on the face of the record or any sufficient reason had been demonstrated. The view of the lower court was that the appellant should have gone on appeal.

18. I have already set out some of the reasons why the appellant applied for review. To me, the reasons constitute fundamental issues for consideration at an appellate forum. They are not obvious or self-evident errors or mistakes that are readily noticeable on record. It is clear that the issues he raised before the lower court were serious and weighty and the other side was seriously contesting them. In my view, there was real danger that the lower court could find itself playing the role of an appellate forum against its own decision.

19. The appeal now before me is against the decision of the lower court. I agree with that decision. My considered view is that the appellant should have appealed instead of applying for review. The substance of his application before the lower court could constitute arguable grounds of appeal but not review. The position taken by the lower court and the decision it made were correct in my view.

20. The upshot, in light of the foregoing, is that the appellant was wrong to have gone to the lower court by way of review instead of preferring an appeal. I agree with the position taken by the lower court and the outcome of the application there. This appeal therefore is one for dismissal and I hereby dismiss it with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF JUNE 2021

In the presence of M/s Mutua for Kathungu Joe for respondent and Appellant in person.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

23.06.2021