REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 9 OF 2012

RAPHAEL MUYU MAKANDA .....APPELLANT/RESPONDENT

VERSUS

JOHNSON UTU KITHEKA.....RESPONDENT/APPLICANT

RULING

1. In the Notice of Motion dated 9th June, 2020, the Respondent has sought for the following orders:

    a. That this Honourable Court be pleased to review its Judgment dated 13th April, 2018 allowing the Appellant's Appeal herein and substitute it with an order dismissing the Appeal herein on its entirety.

    b. That there is discovery of new and crucial evidence that was not brought to the attention of the court.

    c. That costs of this Application be provided for.

2. According to the Respondent's/Applicant's Affidavit, by the Judgment of the court dated 13th April, 2018, the Judgment in Kitui PMCC No. 178 of 2003 was set aside hearing of the same case stayed. It was deponed by the Respondent/Applicant that by the time the present Appeal was being heard, and Machakos HCCC No. 39 of 2003(OS) being dismissed, the decree in Kitui PMCC No. 178 of 2003 had already been executed.

3. It is the deposition of the Respondent that in partially allowing the Appeal, this court based its findings on an alleged pending HCCC No. 39 of 2003 (OS) without confirming its status; that he has discovered that Machakos HCCC No. 39 of 2003(OS) was dismissed by the court on 20th July, 2017 and that the said new evidence was not within the knowledge of this court as at the time it delivered its Judgment.

4. The Respondent/Applicant finally deponed that there is an apparent error on the face of the record and discovery of new evidence to necessitate review of the Judgment and that he was condemned to pay the costs of the Appeal and yet each party won.

5. The Appellant/Respondent filed Grounds of Opposition in which he averred that the Application dated 9th June, 2020 is incompetent, bad in law and lacks merit; that the Application is time barred considering that the court delivered its Judgment on 13th April, 2018 while the Applicant moved to court two (2) years later and that the grounds raised in the Application can only be raised in an Appeal and not an Application for review.

6. In his submissions, the Respondent/Applicant's advocate deponed that the orders directing the setting aside of Judgment in Kitui PMCC No. 178 of 2003 after it had long been executed amounted to an error apparent on the face of the record; that the basis of the findings of the court was the existence of Machakos HCCC No. 39 of 2003(OS) which has since been dismissed and that the said facts have not been challenged by the Appellant/Respondent.

7. It was submitted by the Respondent/Applicant that the court delved into extraneous matters which were not pleaded in the Memorandum of Appeal; that there was no opportunity granted to the Applicant to demonstrate that the Judgment in Kitui PMCC No 178 of 2003 had long been executed and that there was no ground of Appeal stating that Kitui PMCC No. 178 of 2003 ought to have been stayed pending the hearing and determination of Machakos HCCC No. 39 of 2003 (OS).

8. The Appellant/Respondent's advocate submitted that the Applicant participated in the proceedings both in the Appeal and the lower court; that the warrants to give possession were never served upon the Appellant and that at the time of filing the Appeal, HCCC No. 39 of 2003(OS) had not been dismissed.

9. The Respondent/Appellant is seeking to review the Judgment of this court that was delivered in this Appeal on 13th April, 2018. The law

governing review of Judgments and Rulings is Order 45 Rule 1 of the Civil Procedure Rules which provides as follows:

> *"1. (1) Any person considering himself aggrieved –*
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> *(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."*

10. From the above provision of the law, the court can only review its Judgment or Ruling if there is discovery new and important matter which after the exercise of due diligence was not within the knowledge of the Applicant at the time the decree was passed; there was a mistake or error apparent on the face of the record; there were other sufficient reasons and the Application has been made without undue delay.

11. In this Appeal, the Appellant/Respondent challenged the decision of the lower court in Kitui PMCC No. 178 of 2003 which was delivered on 26th January, 2012. The Appellant's/Respondent's contention in the lower court and in this court was that he is the registered proprietor of a parcel of land known as Kyangwithya/Misewani/632 and that the Appellant had trespassed on the said land.

12. After hearing the matter, the lower court agreed with the Respondent/Applicant and ordered for the eviction of the Appellant from the suit property. When the Appellant filed this Appeal, he argued that the learned Magistrate had erred by disregarding the fact that the suit was time barred having purchased the suit property in August, 1982.

13. The evidence that was produced in the lower court was that the Appellant/Respondent had filed HCCC No. 39 of 2003(OS) claiming the suit land by way of adverse possession. In the Judgment of this court, the court stated as follows:

> *"15. It would appear that even after the above order was made, the Respondent neither withdrew the suit (HCCC No. 39 of 2003(OS)) nor had the matter stayed. Instead the matter proceeded for hearing notwithstanding the pendency of the suit in the High Court. That in my view was un procedural.*
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> *16. Considering that under Section 38(1) of the Limitation of Actions Act, it is only the High Court that can hear and determine a claim of adverse possession, the lower court should have stayed the Respondent's suit and await the outcome of the suit that was pending in the High Court in respect to the same land. On that ground alone, I find the present Appeal to be meritorious."*

14. In addition to the above holding, this court found as a fact that the learned Magistrate erred when he failed to determine if indeed the Respondent's suit was time barred or not. The Judgment of the lower court was set aside on that ground.

15. In the current Application, the Respondent/Applicant has averred that by the time this Appeal was being heard, Machakos HCCC No. 39 of 2003(OS) had been dismissed and Judgment in Kitui PMCC No. 178 of 2003 had already been executed.

16. The evidence annexed on the Respondent's'/Applicant's Affidavit shows that indeed Machakos HCCC No. 39 of 2003(OS) was dismissed by the court on 20th March, 2017 for want of prosecution. If that is so, can it amount to a discovery of a new matter which after the exercise of due diligence was not within the knowledge of the Applicant. I do not think so.

17. I say so because when this Appeal was filed in the year 2012, Machakos HCCC No. 39 of 2003(OS) was pending. Indeed, in his submissions dated 24th October, 2016, the Appellant's advocate neither referred to the issue of HCCC No. 39 of 2003(OS) having been dismissed nor the Judgment of the lower court having been executed.

18. In any event, even if HCCC No. 39 of 2003(OS) has been dismissed, the question of whether the learned Magistrate should have dealt with the issue of the suit being time barred or not is still alive. Having set aside the learned Magistrate's Judgment on that account, it cannot be said that the Judgment of this court should be reviewed on the basis that Machakos HCCC No. 39 of 2003(OS) has since been dismissed for want of prosecution.

19. If the Appellant was dissatisfied with the holding of this court that the learned Magistrate should have determined the issue of limitation of time, then he should have filed an Appeal. As was held in ***Nyamogo & Nyamogo vs. Kogo (2001) EA 174:***

> *"There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."*

20. The issue of whether the Magistrate should have addressed the issue of limitation, or whether he should have stayed Kitui PMCC No. 178 of 2003 pending the hearing of Machakos HCCC No. 39 of 2003(OS) cannot be equated with *"errors apparent on the face of the record"*. Those are issues that will require long drawn arguments in the Court of Appeal.

21. Having set aside the Judgment of the lower court in Kitui PMCC No. 178 of 2003, it matters not that the Judgment of the lower court has been executed.

22. Furthermore, the filing of the current Application more than two (2) years after the impugned Judgment of this court flies in the face of the provisions of Order 45 Rule 1 of the Civil Procedure Rules which provides that an Application for review of Judgment or Ruling should be made without unreasonable delay.

23. For those reasons, I dismiss the Application dated 9th June, 2020 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 11TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE