



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 388 OF 2011

PETER THURANIRA NDUBAI.....PLAINTIFF/APPLICANT

VERSUS

KIRIINYA MWENDIA MWITHIMBU.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. Vide a Notice of Motion dated 22nd November, 2019 that was brought pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act, the Plaintiff/Applicant sought for the following orders:

a) That the Honourable Court be pleased to review its Judgment delivered herein on 13th April, 2018 and declare that the Plaintiff was entitled to ownership of eight (8) acres out of L.R. No. 14751/3.

b) That the Hon. Judge in reviewing his Judgment do consider that the Plaintiff is entitled to acquire and own the property as described and the Defendant be ordered to transfer the parcel of land to the Plaintiff, upon payment of the balance of the purchase price.

c) That the Hon. Judge in reviewing his Judgment give due consideration to the fact that the equipment of obtaining a Land Control Board consent in controlled transactions is dulled by time.

d) That the costs of this Application be provided for.

2. The Application was supported by the Affidavit of the Plaintiff who deponed that Judgment was entered in this matter on 13th April, 2018 in which the court held that the failure to obtain the Land Control Board consent to transfer the suit land rendered the Sale Agreement void.

3. Counsel deponed that the Plaintiff and the Defendant entered into a mutually binding Agreement of Sale of the disputed 8 acres out of Land Reference No. 14751/3; that the Plaintiff paid a deposit of Kshs. 1,500,000 as part of the consideration and that the balance was to be paid upon completion.

4. It was the Plaintiff's counsel's deposition that the technicalities arising from the transaction did not preclude the Plaintiff from purchasing the land; that it was the Plaintiff's intention to pay the balance of the purchase price and that despite not obtaining the completion documents, an order for specific performance would have sufficed.

5. It was deponed by counsel that the Defendant had entered into another agreement for sale with other parties over the same land while the agreement for sale with the Plaintiff was subsisting; that the actions by the Defendant demonstrates that his only interest was to obtain money from unsuspecting purchasers and use the same for personal gain and that the Plaintiff was a *bona fide* purchaser of the suit property.

6. The Defendant filed a Replying Affidavit and deponed that the Applicant had already filed an Appeal against the Judgment he is seeking to review; that the purported discovery alluded to in the Affidavit of the Plaintiff's advocate lacked any basis to warrant this court to review its Judgment and that there was inordinate delay in filing the Application.

7. The Defendant deponed that he had since refunded the deposit of the purchase price to the Applicant through a banker's cheque which was duly acknowledged as received by his advocates and that the Application was brought in bad faith, misconceived and an abuse of the court process.

8. The Application was canvassed vide written submissions. Counsel for the Plaintiff submitted that the Defendant approached this court with unclean hands and should not benefit from such deeds; that under Order 45 of the Civil Procedure Rules, any person who is aggrieved by an order or decree from which an Appeal is allowed but which is not preferred, can seek for review.

9. Counsel submitted that although the Applicant intended to Appeal the court's Judgment and filed a Notice of Appeal, he still had a right to seek for review. Counsel relied on the case of **Noradhco Kenya Limited vs. Gloria Michele; Court of Appeal at Mombasa Civil Appeal No. 258 of 1997** where the court held as follows:

"...I agree that a remedy of review is only open when an Applicant having a right of appeal has not only preferred an appeal or when appeal is allowed by law from the order or decree pronounced by the court. But the short point in the question here is; can the lodging of an appeal be tantamount to preferring the appeal itself The filing of an appeal cannot in my humble view deprive a party under Order 44 r.1 of the civil procedure rules to apply for review and notice of appeal cannot be tantamount to preferring an appeal."

10. Counsel submitted that the Plaintiff wrote to the Land Control Board seeking to be furnished with the application for consent which was misplaced; that the Land Control Board in its reply brought to his attention another contract over the same property and that is when the Plaintiff discovered that the Defendant's conduct was fraudulent.

11. Counsel submitted that this Honourable Court should set aside the Judgment because it would be unfair for the Respondent to be allowed to shield himself under Section 6(1) of the Land Control Board Act when in fact he had no intention to be bound by the contract entered into on 1st November, 2010. Counsel stated that the Defendant also failed to reveal to the Plaintiff that the property was charged.

12. According to counsel, in contract, a party who suffers due to the fraudulent actions by the other party is entitled to remedies that exist in a contract and that a contract between the Plaintiff and the Defendant created a constructive trust between them. Counsel relied on several authorities on the doctrine of constructive trust and estoppel which I have considered.

13. Counsel for the Defendant submitted that a review is not available where the Applicant has already preferred an appeal against the decision or order that is sought to be reviewed. Counsel relied on the case of **Shaffique Alibhai vs. William Onchanda Onguru t/a Onchanda Onguru and Co. Advocates & another [2019] eKLR** where the court held:

"I would think that there is a difference between preferring an Appeal and institution of an Appeal. An Appeal is preferred once a notice of Appeal is duly lodged under the provisions of Rule 75 of the Court of Appeal Rules. An institution of an Appeal is a step taken after the Appeal has been lodged. Taking cue from Order 42 Rule 6 of the Civil Procedure Rules, an Appeal for purposes of Section 80 and Order 45 on Review is deemed as duly filed when a Notice of Appeal has been given."

14. Counsel submitted that the Notice of Appeal filed by the Applicant had not been withdrawn and no such evidence of withdrawal had been furnished; that the Applicant had not discovered new and important matter or evidence which warranted this court to review its Judgment and that in any case, for a discovery of new evidence to warrant a review of the Judgment, it should be one that concerns a discovery of new and important matter of evidence as provided in Order 45(1) of the Civil Procedure Rules.

15. Having considered the pleadings and the submissions, the only issue that arises is whether the court should review its Judgment dated 13th April, 2018.

16. This suit was commenced by way of a Plaint dated 21st December, 2011 in which the Plaintiff sought for an order of specific performance to compel the Defendant to release the necessary completion documents to complete the sale and effect the transfer of the suit property to him. The Plaint was dismissed by this court vide the Judgment dated 13th April, 2018.

17. Order 45 Rule 1 and 2 of the Civil Procedure Rules, 2010 provides as follows:

"(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment 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 the appellate court the case on which he applies for the review."

18. The law allows a party "who is not appealing from a decree or order" to apply for review of an order or decree of the court. Although the Plaintiff's counsel has submitted that the mere filing of a Notice of Appeal does not divest one of the right to file an Application for review, recent decisions from the Court of Appeal shows otherwise.

19. In the case of *N.P.R Warren & 8 others vs. Christopher Musyoka Musau [2020] eKLR*, the Court of Appeal held as follows:

*“Our take on the above expositions is that: the right of review is in competition with the right of direct appeal; the right of review has primacy over the right of appeal where it is invoked earlier in time and it can even be determined notwithstanding the pendency of an appeal filed later in time over the same substratum. The converse is however also true that there is no jurisdiction to entertain an application for review during the pendency of an appeal which was filed earlier in time. See also the case of **Origo & Another vs. Mungala [2005] 2KLR 307**, in which the Court held inter alia held that a person who files a Notice of Appeal which is struck out cannot thereafter proceed by way of review.”*

20. In *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] eKLR*, the Court of Appeal held as follows

*“Section 2(2) of the Court of Appeal Rules defines an Appeal to include an intended Appeal. The Respondent lodged a Notice of Appeal on 30th August, 2016. The Appellant submitted that though no substantive Appeal had been filed, a Notice of Appeal had been lodged. Mr. Ojuro on the other hand submitted that the Appeal was intended for part of the Ruling and as such the law did not bar the Respondent from filing for review on the other part of the Ruling. A perusal of the Notice of Appeal indicates that the Respondent intended “to appeal to the Court of Appeal on dismissal of the client reference and allowing the advocates reference on taxation”. A careful look at the Ruling dated 17th August, 2016 shows that what the Respondent intended to appeal against though phrased as part was the entire ruling delivered by the learned Judge. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of **Karani & 47 Others v Kijana & 2 Others [1987] KLR 557** the court held that:*

“...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

21. Rule 2 of the Court of Appeal Rules defines an Appeal to include an intended Appeal. The Plaintiff lodged a Notice of Appeal on 4th May, 2018. Having filed the Notice of Appeal against the entire Judgment of this court, it was not open for the Plaintiff to file the Application for review under Order 45 of the Civil Procedure Rules.

22. As was held by the Court of Appeal in the above two decisions, it is not permissible to pursue an Appeal and an Application for review concurrently. If a party chooses to proceed by way of an Appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. It does not matter that a Record of Appeal has not been filed.

23. Despite the fact that the substantive appeal had not been filed, the Plaintiff filed a Notice of Appeal before filing the current Application for review of the Judgment. That Notice of Appeal has not been withdrawn to date. In effect, the Plaintiff is pursuing the relief of review while keeping open its option to appeal against the same Judgment, which is not permissible.

24. Consequently, on that ground alone, I find the Application dated 22nd November, 2019 to be incompetent and bad in law. The Application dated 22nd November, 2019 is struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021

O.A. ANGOTE

JUDGE