



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. CASE NO. 951 OF 2017**

**(FORMERLY NAIROBI CIVIL APPEAL NO. 790 OF 2005)**

JACINTA PERE.....1<sup>ST</sup> APPELLANT

NJENGA MARIMBEL.....2<sup>ND</sup> APPELLANT

**VERSUS**

**LUKAS KIBENGWA OKARA T/A**

**KENAGWA ENTERPRISES.....1<sup>ST</sup> RESPONDENT**

**OLE KEJUADO COUNTY COUNCIL.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Hon. T.W.C Wamae (Mrs.) delivered on*

*15<sup>th</sup> September, 2005 in Milimani Commercial Courts SRM Civil Suit No. 9710 of 2002)*

**JUDGEMENT**

**Introduction**

By a Memorandum of Appeal dated the 12<sup>th</sup> October, 2005 and filed on 13<sup>th</sup> October, 2005, the Appellants' appeal against the ruling of Hon. T.W.C Wamae (Mrs.) delivered in Milimani Commercial Courts SRM Civil Suit No. 9710 of 2002) on 15<sup>th</sup> September, 2005. The genesis of this Appeal is that the trial court in its ruling dismissed with costs the Appellants' Notice of Motion Application dated the 8<sup>th</sup> July, 2005 on grounds that it had no merits.

The trial court's Ruling emanated from the Appellants'(Defendants) Notice of Motion Application dated 8<sup>th</sup> July, 2005 where they sought for the following orders:

- (a) That this honorable court be pleased to set aside or review its judgment passed on the 16<sup>th</sup> day of September, 2003.
- (b) That upon grant of prayer 1 (above), the court order re-hearing of the case *de novo*.
- (c) That the costs of this Application be borne by the Plaintiffs/Respondent.
- (d) That the costs of this suit be provided for.

The Appellants being aggrieved with the decision of the trial Magistrate proceeded to file a Memorandum of Appeal dated the 14<sup>th</sup> October, 2003 in the High Court at Nairobi being Civil Appeal No.790 of 2005, which was later transferred to the Environment and Land Court at Kajiado in 2017. The Memorandum of Appeal is based on grounds that:

- (a) The learned Trial Magistrate failed to appreciate the evidence adduced in support of the Appellants' Application by erroneously holding that there was no new and important evidence to warrant review.
- (b) The Trial Magistrate erred in law and fact by holding that there was inordinate and inexplicable delay on the part of the Appellant of more than two (2) years when indeed there was only a delay of four (4) months which was well explained.

(c) The Trial Magistrate erred in law and fact in holding that the new evidence being related to Plot Numbers 1104 and 140 did not relate to Plot Numbers 143 and 144 claimed by the Plaintiff therein and was irrelevant when it was clear that the claim is based in trespass.

(d) The trial Magistrate erred in law and fact in disregarding the new evidence contained in the 3<sup>rd</sup> Defendant's letter dated 29<sup>th</sup> March, 2005 which was an annexure to the Application since the same had clearly confirmed that the developments undertaken by the Appellants were on Plots Numbers 140 and 1104 and not 143 and 114 as alleged by the Plaintiffs therein.

(e) The Trial Magistrate erred in law and fact in failing to appreciate that the evidence adduced by the Plaintiff's witness (PW 2), was perjured and misleading

(f) The Trial Magistrate erred in law and fact in failing to appreciate that the Appellants had demonstrated that there was sufficient reason to grant review.

The Appellants prayed for orders that:

(a) THAT the Ruling of the Subordinate Court in C.M.C.C No. 9710 of 2002 made on 15<sup>th</sup> September, 2005 with all the consequent orders be set aside.

(b) THAT upon grant of prayer 1 above, this Honorable Court order the re-hearing of the case de-novo

(c) THAT the Appellant be awarded costs of this Appeal.

The appeal was canvassed through written submission.

#### **Appellants' submissions**

The Appellants in their submissions reiterated their claim as enumerated in the Memorandum of Appeal. They contended that this Court in considering the Appeal is mandated to consider and evaluate the evidence of the trial court. They argued that the Court should review the trial court's ruling due to discovery of new evidence of a letter dated 29<sup>th</sup> March, 2005 from the 2<sup>nd</sup> Respondent and Part Development Plan from the Ministry of Lands dated 2<sup>nd</sup> November, 1998. Further, that new evidence confirmed that Plot. No. 1104 and 140 were prepared and approved by Government departments after conduct of site visit by the 2<sup>nd</sup> Respondent's Surveyors'. They claimed the 1<sup>st</sup> Respondent procured judgment fraudulently, as the trial court ruling in favor of the said 1<sup>st</sup> Respondent was informed by the testimony of PW2, the 2<sup>nd</sup> Respondent's Surveyor whose evidence confirmed that the Appellants trespassed on the 1<sup>st</sup> Respondent's land upon which they were notified by a letter dated 28<sup>th</sup> August, 2002 that the suit property being Plot Nos. 143 and 144 belonged to the 1<sup>st</sup> Respondent. They reiterated that the 2<sup>nd</sup> Respondent by its letter dated 29<sup>th</sup> March, 2005 distanced itself from PW2's testimony which the trial court relied upon in delivering its ruling. They further submitted that it was strange how the trial court in dismissing the Appellants' Application ruled that the suit property belonged to the 1<sup>st</sup> Respondent yet these were different from Plots 1104 and 140. To buttress their averments they relied on section 80 of the Civil Procedure Act as well as the following decisions: **Kiruga vs Kiruga & Another (1988) KLR P.348 and Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another (2018) eKLR; Muyodi vs Industrial & Commercial Development Corporation & Anor, (2006) 1EA 243; Mbogo & Another vs Shah (1968) E.A 93 at page 95; Ariban Tuleswar Sharma vs Aribam Pishak Sharma (1979) 45CC 389, 1979 (11) UJ 300 SC Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR; and Khalif Sheikh Adan v Attorney General (2019) eKLR.**

#### **Respondents Submission**

The 1<sup>st</sup> Respondent in his submissions insisted that the Appellants' in their Application dated 8<sup>th</sup> July, 2005 did not tender any new evidence which upon due diligence was not within their knowledge when the said order was made. He contended that the said new evidence related to Plot Nos. 1104 including 140 but not the suit properties and this did not contradict PW2's testimony. Further, that the Appellants had an opportunity to test the veracity of PW2's evidence during cross examination which they never did. He further submitted that the Appellants failed to give reasons for the three years delay, in carrying out due diligence with the 2<sup>nd</sup> Respondent who was the custodian of the records of the suit property and this ought to have been their first point of reference. On whether the Appellants in their Application dated 8<sup>th</sup> July, 2005 showed sufficient reason for granting of the review orders sought therein, the 1<sup>st</sup> Respondent proceeded to give the definition of "**sufficient reason/cause**" and argued that the Appellants' failed to show sufficient reason to warrant review of the trial court's ruling as they were negligent in failing to retrace rebuttal evidence in support of their case from the 2<sup>nd</sup> Respondent from 2002 to 2005. Further, the Application for review of trial court's judgment was filed on 8<sup>th</sup> July, 2005 yet the Judgment was delivered on 16<sup>th</sup> September, 2003. He reiterated that the Appellants never raised any objection to PW2's testimony whose witness summons were served upon the 2<sup>nd</sup> Respondent's County Clerk during the trial of the case, upon which PW2 was sent to testify in the trial court and produce documents to the effect that the suit properties belonged to the 1<sup>st</sup> Respondent. He further submitted that the Appellants never gave any reasonable explanation why they delayed in filing the impugned application for review. He reiterated the Appellants' arguments that the delay was occasioned by service of Decree on 28<sup>th</sup> June, 2005 upon them is unreasonable as the said Decree was available from 16<sup>th</sup> September, 2003 when the trial court delivered its judgment. To support his arguments, he relied on Order 45 Rule 1(1) of the Civil Procedure Rules including the following decisions: **Republic v Advocate Disciplinary Tribunal Ex Parte Apollo Mboya Nairobi Judicial Review Misc. Application Number 317 of 2018; Estate of Godfrey Nyoga Kamunyari (Deceased), Embu Succession Cause No.612 of 2019; Titus Mutiso Mbindyo v Motor Boutique Limited, Nairobi ELRC Cause Number 1528 of 2014; Mugumoini Farmers Company Limited v Inshwil Builders Engineers Limited; and Ephraim Waithaka Ruita & Another (Interested Parties), v Muranga ELC Case Number 67 of 2018.**

## Analysis and Determination

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

- Whether the Ruling delivered on 15<sup>th</sup> September, 2005 in the Milimani Commercial Courts SRM Civil Suit No. 9710 of 2002 should be set aside.
- Whether the Appeal is merited.

As to whether the Ruling delivered on 15<sup>th</sup> September, 2005 in the Milimani Commercial Courts SRM Civil Suit No. 9710 of 2002 should be set aside and if the Appeal is merited.

Before I make a determination on whether this Appeal is merited or not, I wish to provide the background of this matter. In the trial court the 1<sup>st</sup> Respondent had sought for declaration that he is the owner of plot numbers 143 and 144 Ongata Rongai; a permanent injunction restraining the Appellants from trespassing or constructing on the said plots; General damages for trespass and mesne profits; an order for the Appellants to hand over vacant possession of the said plots and costs. The Appellants in their Defence insisted they own Plots 1104 and 140 which they had developed and denied trespassing on plot numbers 143 and 144. The trial Magistrate in her judgement dated the 16<sup>th</sup> September, 2003, declared that the 1<sup>st</sup> Respondent owned plots 143 and 144 which the Appellants had trespassed upon by putting up permanent structures thereon. Further, that as per the area map, there was no confusion in respect to plots 143 and 144 as well as 1104 and 140 respectively. She sufficed and stated that the Appellants remedy lay with the 2<sup>nd</sup> Respondent.

The Appellants being aggrieved with the said decision, immediately filed a Memorandum of Appeal dated the 14<sup>th</sup> October, 2003 which they later withdrew vide a Notice of Withdrawal of Appeal dated the 29<sup>th</sup> June, 2005 that was filed on 5<sup>th</sup> July, 2005 and opted to file the Notice of Motion Application for Review dated 8<sup>th</sup> July, 2015 which I have highlighted above that forms the fulcrum of the dispute herein. The Trial Magistrate in her Ruling dated the 15<sup>th</sup> September, 2005 to the application for review proceeded to hold as follows: *'The report to the effect that Applicant/ Defendants were occupying Plaintiffs plots 143 and 144. The said reports authenticity has not been challenged. If 3<sup>rd</sup> Defendant had any better evidence to offer, they ought to have done so at the hearing. Their letter marked JP7 is therefore of no consequence. In view of the report marked P. exh. 9 and it does not in any way affect the evidence on record. PW2s evidence was adduced on 20<sup>th</sup> August, 2003 and it is therefore not new in any way. I have considered the alleged new and important evidence and find that its neither new nor important and even if it was new and important the delay of 22 months is inordinate and inexcusable. In the result I find that application dated 8<sup>th</sup> July, 2005 has no merit and it is disallowed with costs to Plaintiff/Respondent.'*

The legal provisions governing review are contained in Section 80 of the Civil Procedure Act which provides that : -**"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."**

While, 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.'**

While, in the case of **Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR**, the Learned Judge favourably cited the **Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others<sup>[5]</sup> 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 stabilizing 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 **National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR**

From a reading of the said legal provisions I have cited, the parameters of review are clear that there has to be discovery of new and important matter which was not within the knowledge of the party seeking a review and could not be produced by him at the time when the decree was passed or the order made. Further, a review can be done when there is a mistake or error apparent on the face of the record, or for any other sufficient reason. Upon perusal of the application for review and the impugned Ruling, I note the Appellants' filed the application for review, two years after withdrawing their Appeal. They claim they filed the application late as they had not extracted the Decree. To my mind, I believe they are not being candid. It is trite that upon delivery of judgement, parties are free to apply for the Decree and they did not provide a plausible reason why they failed to do so for two years. It is my considered view that the delay in filing the application for review

was inordinate and inexcusable. Further, in the said application for review, the issue canvassed on ownership of the plots by the respective parties was actually presented during the hearing with each party producing their respective documents of title. I note the Appellants indeed admitted that the 1<sup>st</sup> Respondent was the owner of plots 143 and 144 Ongata Rongai. They further confirmed owning plots 1104 and 140 respectively. These were the same issues that the parties had tendered evidence upon. In the said application for review except for the annexures that were presented, the Appellants did not demonstrate that this was discovery of new and important evidence which had not been within their knowledge during the hearing. Further, it was evident in the proceedings that they fully participated in the hearing, but were not clear why they wanted the same to commence afresh. 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 Trial Magistrate indeed appreciated the evidence adduced in support of the Appellants' Application and rightly held that there was no new and important evidence to warrant review. I further find that the trial magistrate was correct in holding that there was inordinate and inexplicable delay on the part of the Appellants of more than two (2) years to apply for review. I disagree with the Appellants that there was only a delay of four (4) months after they applied for a Decree. Further, I find that the trial Magistrate was right in holding that the new evidence relating to Plot Numbers 1104 and 140 did not relate to Plots Numbers 143 and 144 as claimed by the Plaintiff therein and was hence irrelevant. As to whether the trial Magistrate erred in law and fact in disregarding the new evidence contained in the 3<sup>rd</sup> Defendant's letter dated 29<sup>th</sup> March, 2005 which was an annexure to the Application since the same had clearly confirmed that the developments undertaken by the Appellants were on Plots Numbers 140 and 1104 and not 143 and 114 as alleged by the Plaintiff therein. I note in the said letter, the author simply reaffirmed that the Appellants owned Plot Numbers 140 and 1104 which they had developed and this was not new evidence as they had stated so in their Defence as well as oral testimony. I do not find that the Trial Magistrate erred in law and fact in failing to appreciate that the evidence adduced by the Plaintiff's witness (PW 2), as perjured and misleading since the Appellants did not oppose his testimony and even cross examined him to test the veracity of his evidence. To my mind I find that the Trial Magistrate was right when she found that the Appellants had not demonstrated that there was sufficient reason to warrant a review. I further find that the Learned 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 Appellants failed to meet the threshold set for review. I opine that the Appellants have not demonstrated what sufficient reasons could make the trial magistrate review the said judgement and make an order to commence the hearing de novo.

It is against the foregoing that I proceed to uphold the Ruling delivered by Hon. T.W.C Wamae (Mrs.) on 15<sup>th</sup> September, 2005 in Milimani Commercial Courts SRM Civil Suit No. 9710 of 2002.

The upshot is that I find this Appeal unmerited and will proceed to dismiss it with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**