



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELC APPEAL NO. 7 OF 2021
(FORMERLY KAKAMEGA ELC APPEAL NO. 12 OF 2020)
EVANS MUDOGA MATEBWA.....APPELLANT
VERSUS
PETER ASINGIRA ONDIRI.....RESPONDENT
(From the ruling of Hon. S. O. Ongeri PM dated 28th April 2020 in
VIHIGA PMC (EL) CASE NO. 60 OF 2018)

JUDGEMENT

Introduction

1. Vide a Memorandum of Appeal dated 18th May 2020, the Appellant appeals to this court challenging the Ruling dated 28th April 2020 in VIHIGA PMC (EL) CASE NO. 60 OF 2018 wherein the court dismissed an application for review of judgement.
2. A brief background of the case is that the Appellant was the Defendant and the Respondent the Plaintiff in VIHIGA PMC (ELC) NO. 60 OF 2018. The substantive claim in the case was an order of permanent injunction restraining the Appellant from trespassing onto a land parcel known as KAKAMEGA/MASANA/1208, the suit land. The Appellant filed a defence dated 19th April 2018 denying liability and stating that he owns a parcel of land known as NO. KAKAMEGA/MASANA/1211 which is different and distinct from the suit land. By a consent order dated 2nd April 2019 the dispute was referred to the County Land Surveyor Vihiga County with a view to establish the boundary between the suit land and land parcel No. KAKAMEGA/MASANA/ 1211 and file a report of his findings in court. The surveyor undertook the exercise and filed a report dated 13th May 2019.
3. On 16/7/2019 the parties recorded a consent before the trial court in the following terms “by consent the county surveyor report dated 13/5/2019 be deemed as expert witness evidence and the statements of witnesses be adopted as evidence and the list of documents as exhibits. Judgement on 20/8/2019.” Based on the Consent order, the court proceeded to deliver its judgement on 1st October 2019 allowing the Plaintiff’s claim.
4. Subsequently, the Appellant filed an application vide Notice of Motion dated 28th October 2019 seeking for review of the judgment. The trial court heard the application, found that it lacked merit and vide its ruling delivered on 28th April 2020 dismissed the application with costs to the Respondent. This is the Ruling that is the subject of this appeal.
5. Directions on the appeal were given that the appeal be canvassed by way of written submissions. Pursuant to the directions, the Appellant filed written submissions dated 19th October 2021 through the firm of Odhiambo Gwada & Co. Advocates and the Respondent filed his written submissions dated 3rd November 2021 through the firm of Ko’Winoh & Company Advocates.

The Appellant’s Case

6. The Appellant’s case is contained in the grounds of appeal in the memorandum of appeal as follows:
 - a) *That the learned trial Magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence as the record thus reaching the wrong decision*
 - b) *That the learned trial Magistrate abdicated his statutory duty in failing to address the substantial issues raised regarding*

pleadings by the parties thus causing a miscarriage of justice and reaching a wrong verdict

c) That the learned trial Magistrate erred in law and fact in failing to find that there is serious error apparent on the face of the Record which error go to the substratum of the said suit thus causing a miscarriage of justice.

d) That the learned trial Magistrate erred in law and fact in finding in favour of the Respondent, when the Survey Report herein clearly had serious errors warranting a review of the judgement earlier entered.

e) That the learned trial Magistrate erred in law and in fact in failing to appreciate that the consent rewarded by the parties was based on a serious error and mistake therefore it ought to be reviewed.

7. The appellant submits that there was an error in the pleadings filed by the Respondent, that while the Respondent pleaded that he owns land parcel No KAKAMEGA/MASANA/1211, he sought injunctive orders on a different land parcel, that the surveyor's report had serious errors as it is indicated from the annexed sketch map that it relates to a different parcel of land. He submits further that parties are bound by their pleadings. He submits that the court in dismissing the Application for review failed to exercise its discretion judiciously. He prays that the Appeal be allowed with costs. The Appellant relies the case of **Omokola & 2 others vs Municipal Council of Mombasa & 3 others KLR (2000) 213**, to support his case.

The Respondent's case

8. The Respondent through his written submissions opposes the appeal. He contends that the trial court had rightly proceeded on the basis of a consent order. That it was not part of the consent that the surveyor would attend court to be cross-examined. That there is no error apparent on the face of the record hence the trial court was right in the decision it made of dismissing the application for review. He prays that the appeal be dismissed. He relies on the case of **SMS -Vs-ZM 5 & 3 Others Civil Appeal No. 205 Of 2014 [2017] eKLR** to support his argument.

Issues for determination

9. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and identify the following as the issues that emerge for determination:

- a. Whether or not the Appellant satisfied the grounds for grant of an order of review in his application in the trial court.
- b. Whether or not the trial court erred in dismissing the application
- c. What order to make on costs

Analysis and determination.

10. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

11. This is an appeal against a ruling on an application for review of judgement and not an appeal against the judgement. Hence the evidence on record for this court to reconsider and analyze is the evidence in respect of the application for review. It includes the Application, the Supporting Affidavit sworn by the appellant on 28th October 2019, Replying Affidavit sworn on 26th November 2019 by the Respondent and the submissions by the parties on the Application for Review.

Whether or not the Appellant satisfied the grounds for review in his application in the trial court.

12. The law on review of court judgements or orders is found in Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules 2010. The grounds upon which a court can review its judgement under order 45 Civil Procedure Rules are:

- i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or order made or
- ii) Some mistake or error apparent on the face of the record
- iii) Or any other sufficient reason.

13. In order for the Application to have succeeded, the appellant had a duty to prove, on a balance of probabilities, the existence of the

above-mentioned grounds for grant of an order of review.

14. The grounds upon which the Application for review were brought were listed on the face of the Application as follows.

- a. *That there was a Judgment that was delivered on 1/10/2019.*
- b. *The applicant stands to suffer substantial loss and damage in case the Respondent is allowed to execute the said judgement.*
- c. *That there is an error apparent on the face of the record hence the need for this court's intervention to review the judgment.*
- d. *That it is in the interest of justice and fair play that the orders sought be granted.*
- e. *That the Respondent will suffer no prejudice whatsoever if the orders sought are granted.*
- f. *That this application has been made without undue delay.*
- g. *That this is a fit and proper case for review.*

The substantive ground was that there was an error apparent on the face of the record. This was stated both on the Notice of Motion and in the Supporting Affidavit. On the Notice of Motion the Appellant stated that:

“That there is an error apparent on the face of the record hence the need for this court's intervention to review the judgment.”

In the Supporting Affidavit the Appellant proceeded to give what according to him were the particulars of the error as follows: a) that the Respondent had indicated in his pleadings that he was the proprietor of land parcel NO. KAKAMEGA/MASANA/1211 yet he sought orders in respect of a different parcel of land namely KAKAMEGA/MASANA/1208, b) that the surveyor who prepared the report did not appear in court to be cross examined and defend his findings/report and c) that the appellant was not granted a hearing to defend himself thus breaching his constitutional rights.

15. Was there indeed an error apparent on the face of the record? Firstly, on the pleadings, the court record shows that although in paragraph 3 of the Plaintiff the Respondent stated that he was the registered proprietor of parcel of land NO. KAKAMEGA/MASANA/1211, in paragraph 4 of the same plaintiff he states that the Appellant had interfered with his (Respondent's) parcel NO. SOUTH MARAGOLI/MASANA/1208 by cultivating a portion of the parcel and prevented the Respondent from accessing and using the same. Also in the prayers in the Plaintiff, the substantive relief sought was

“ a permanent injunction restraining the Defendant either by himself, agents servants or any other person whomsoever from entering, using or interfering with the Plaintiff peaceful user of the suit parcel NO. KAKAMEGA/MASANA/1208.”

16. Among the documents filed by the Respondent in support of his case and which was admitted by consent as an exhibit was a copy of title deed dated 19th November 2012 in respect of KAKAMEGA/MASANA/1208 in the name of Peter Asingira Ondori the Respondent herein. In his testimony as contained in the witness statement dated 3rd April 2018 the Respondent stated that he was the owner of land parcel NO. KAKAMEGA /MASANA/1208. This matter was referred to the County land Surveyor to establish the disputed boundary and from the wording of the court order dated 2nd April 2019 referring the matter to the surveyor, the dispute was between parcel NO.s KAKAMEGA /MASANA/ 1208 and KAKAMEGA/MASANA/1211. In paragraph 2 of the Supporting Affidavit the Appellant states that he was sued in respect of land parcel No. KAKAMEGA/MASANA/1208.

17. From the above analysis of the evidence, it is evident that the suit land was identifiable to the court and all the parties. There was no doubt that the dispute was between land parcel No. KAKAMEGA/MASANA/ 1211 belonging to the Appellant and KAKAMEGA /MASANA/1208 belonging to the Respondent.

18. The second error, according to the Appellant, was that the surveyor who prepared the report did not attend court to defend the report. The terms of reference for the surveyor were contained in the court order dated 2nd April 2019 which was a consent order. These terms were that the surveyor was to visit pieces of land known as KAKAMEGA/MASANA/1208 and 1211, establish the boundary and file a report on the same. I find nothing in the said order or in the court record generally that required the surveyor to attend court to defend his report.

19. The third error pointed out by the Appellant is that the Appellant was not given a chance to be heard in his defence. Given the manner the prosecution of the matter was conducted as described in the background hereinabove, namely that the parties entered into a consent that determined the trial, I find that the allegation that the appellant's constitutional rights were breached has no basis. The Appellant was competently represented by counsel during the conduct of the suit and prosecution of the Application.

20. Courts have defined and interpreted what 'mistake or error apparent on the face of the record' is. In the case of **Moses Kipkolum Kogo vs Nyamogo & Nyamogo Advocates [2000] eKLR** the court held that

“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 requires to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.”

21. On whether or not the trial court erred in dismissing the Application, I find that the order that commended itself to the court after the Appellant failed to prove any of the grounds for review was dismissal of the Application.

In the case of Evan Bwire –vs- Andrew Nginda Civil Appeal No. 103 of 2000 LLR 8340 the court held that:

“an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh”.

22. From my analysis of the material placed before the trial court and the impugned ruling I find that the learned trial Magistrate neither failed to fully analyze and evaluate the evidence nor reached a wrong decision. I also find that there were no substantial issues raised regarding pleadings by the parties which the trial court failed to address and no miscarriage of justice was occasioned. I further find that there was no error apparent on the face of the record which error would go to the substratum of the said suit.

23. The upshot is that none of the grounds of appeal has been proved. I hereby dismiss the Appeal. Each party to bear own costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 25TH DAY OF NOVEMBER, 2021.

E. ASATI

JUDGE

In the presence of

Odhiambo C. for the Appellant

Respondent present in person

Court Assistant Ajevi

E. ASATI

JUDGE.