



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi & another v Mwangi & another (Civil Appeal
E033 of 2021) [2023] KEHC 19537 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E033 OF 2021**

J WAKIAGA, J

JULY 4, 2023

BETWEEN

EDWARD MURUGAMI MWANGI 1ST APPELLANT

KIMANI GACHANJA 2ND APPELLANT

AND

EZEKIEL JULIUS GICHERE MWANGI 1ST RESPONDENT

GITHAMBO TEA FACTORY LTD 2ND RESPONDENT

*(Being an Appeal from the Ruling and order of Hon. E. Muriuki
Nyagah SPM in Murang'a Law Courts Civil Case No 422 of 2016)*

JUDGMENT

1. This Appeal arises out of an interlocutory Ruling by the trial Court on a Notice of Motion dated March 26, 2021 in which the Appellants sought among other orders that the status quo as regards the access road to land parcel No LOC.8/ Matharite/ 535 and the collection of tea leaves at Gathunguri tea buying centre pending the hearing and determination of the application and that the Court do review modify set aside its Ruling delivered on March 2, 2021.
2. In dismissing the application, the Court stated that there was pending an Appeal being Civil Appeal No 2 of 2020 pending determination and therefore granting the orders sought was akin to the Court sitting on its own Appeal.
3. Being aggrieved by the said Ruling the Appellants filed this Appeal and raised the following grounds of Appeal:
 - a) The Court erred in dismissing the application without giving reasons for doing so.



- b) The trial Court erred in failing to review modify or set aside the Ruling of March 2, 2021 while there was an apparent error on the face of the record.
- c) The Court erred in failing to rule that the Murang'a High Court Civil Appeal No 2 of 2020 was time barred having been filed two months after the delivery of the Ruling without leave of the Court.
- d) The learned magistrate failed to use the slip rule to review the Order and Ruling dated March 2, 2021
- e) The Order of June 15, 2021 was dismissed yet the Respondents had not filed any submissions thereon and against the weight of affidavit evidence.
- f) The Ruling and Order dated June 2, 2021 was plainly biased against the Appellants.

Submissions

4. Directions were issued on the hearing of the Appeal by way of Written Submissions. On behalf of the Appellant, it was submitted that Section 80 of the *Civil Procedure Act* gives the Court the power of review as was confirmed in the case of *Nyamogo & Nyamogo v Kogo [2001] EA 170* where the Court discussed the ground of error apparent on the face of record to the extent that there is a distinction between a mere erroneous decision and error apparent on the face of the record. It was submitted that the Court erred in law and in fact in by dismissing the application yet the Respondent had not filed any submissions to the same and clearly against the weight of the evidence on record.
5. On behalf of the first Respondent, it was submitted that the application before the trial Court was for stay of execution pending Appeal which was allowed and which the Appellant was not happy with so they sought for an order of review and setting aside which the Court disallowed. It was submitted that there was no error apparent on the face of the record and that the Court exercised judicial discretion as was stated in the case of *Mbogo V Shah* while granting the Order of stay for preservation of the property pending the hearing of the main suit as the issue of the access road can only be determined by way of evidence.
6. On behalf of the second Respondent, it was submitted that the Appellants are aggrieved by the Order of the Court in which it stayed the grant of mandatory injunction compelling the 2nd Respondent to collect green tea from Githunguri tea Buying Centre through the contested road of access which the 1st Respondent stated was his land and that the Appeal was whether the trial Court erred in refusing to sustain the injunction issued noting that the claim of the Appellants in the plaint was for damages for loss incurred due to non-collection of green leaf tea and therefore the Order for injunction previously granted were unlawful.
7. It was contended that the learned Magistrate exercised his judicial discretion wisely which the Court should not interfere with as was stated in the case of *Mbogo V Shah*, noting that mandatory injunctions will not ordinarily be granted, unless there are special circumstances as was stated in *Kenya Breweries Ltd v Washington Okeyo [2002] eKLR* where the Court held that mandatory injunctions should not be granted in the absence of special circumstances and if the case was clear. This position was restated in *Sherriff Abdi Hassan v Nadhif Jama Adan [2006] eKLR* where the Court held that Courts have been reluctant in granting mandatory injunctions at interlocutory stage unless the person from whom it is sought is clearly on the wrong.

Proceedings



8. This being a first Appeal, the Court is under a duty to re-evaluate the proceedings before the lower Court to come to its own conclusion thereon. By a plaint dated December 5, 2016 the Appellant stated that at all material times since the land consolidation there had always been an access road traversing LOC 8/Matharite/535, LOC 8. /Matharite /1016 and LOC 8/Matharite /1445 which belongs to the Appellant while 535 belonged to the 1st Respondent. That the 1st Respondent wrote to the 2nd Respondent denying access to the tea buying centre. The Appellant therefore sought an order directing the first Respondent not to deny access to the Appellant to the buying centre on LOC 8 /Theri/1290 and the 2nd Respondent to continue collecting tea as before.
9. By a Notice of motion dated September 2, 2019 the subject matter of this Appeal, the Appellants' sought for an order of temporary injunction restraining the 1st Respondent from blocking the accesses road leading to Githunguri Tea buying Centre pending the hearing and determination of the suit and a mandatory injunction compelling the 2nd Defendant to collect tea leaves from Githunguri Tea Buying Centre under the supervision of OCS Kahuro Police Station.
10. The Application was supported by an affidavit sworn by Kimani Gachanja in which he deposed that he was a shareholder of Githambo Tea Factory Limited which built Githunguri Tea Buying Centre and that the 1st Defendant had dug a trench to block KTDA lorries from collecting tea leaves from the centre thereby causing them loss and damages amounting to Kshs 500 per day and that the said road had existed since 1962 when land demarcation was done and therefore he had no right to block the same.
11. The said Application was opposed by the 1st Defendant through grounds of opposition dated September 16, 2019 to wit that the issues raised by the Applicant were unsustainable since the suit property had been changed and altered and that there was an alternative access road which was alleged to be impressable so the Applicants were seeking to trespass through private property.
12. By a Ruling thereon dated November 29, 2019 the Court allowed the application in light of greater public interest. The Respondents not being satisfied by the said Ruling filed a Memorandum of Appeal in Civil Appeal No 2 of 2020 at Murang'a and on January 30, 2020 took out a Notice of motion for stay of execution of the Orders of the Court pending the hearing and determination of the application. The Respondent sought for leave to file an Appeal out of time and for the status quo to be mentioned on the grounds that the Court lacked jurisdiction under the provisions of Land Act 2012.
13. The application was supported by an annexed affidavit sworn by Julius Gichere Mwangi in which he deposed that the Ruling meant that they give up their private land free of charge without compensation.
14. The application was opposed by the Appellants through a replying affidavit in which it was deposed that the deed plan for the area shows that there is an access road passing through the land which was illegally blocked by the 1st Respondent and that the intended Appeal was not lodged at the Environment and Land Court and that pursuant to the Consent Order their tea was being collected and not going to waste and that the Respondents would suffer no loss through the use of the road as they could adequately be compensated. It was deposed that any stay order granted will put many families in jeopardy.
15. By a Ruling thereon dated March 2, 2021 the trial Court allowed the application and stated that the general principle in granting or refusing a stay, if there is no other overwhelming hindrance a stay must be granted so that an Appeal may not be rendered nugatory should the appellate Court reverse the judgement.



16. The Appellant not being happy by the turn of event filed the notice of motion dated March 26, 2021 under certificate of urgency aforesaid which application was dismissed by the Court on the grounds that granting the orders sought will be akin to the Court sitting on its own Appeal.
17. From the proceedings, the record of Appeal and the submissions herein, the only issue for determination is whether the trial Court exercised its discretion judiciously in refusing to review modify or set aside its order of March 2, 2021 and or to maintain the status quo as regards the access road.
18. The grounds upon which a Court may review its orders in my view is now well settled in Kenya. As submitted by the Appellant Section 80 of the Civil Procedure Code gives power to the Court to review the decree or order where from which no Appeal has been preferred and the Court may make orders which it thinks fit. Order 45 rule 1 gives the conditions upon which a review may be granted as follows:
 - a. 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.
 - b. On account of some mistake or error apparent on the face of the record.
 - c. Or any other sufficient reason.
 - d. The application must be made without undue delay.
19. In this Appeal the Appellant contention is that there was an error apparent on the face of the record and that the Respondent had not filed submissions so the Ruling was against the weight of affidavit evidence adduced by the Appellants.
20. What constitute error apparent on the face of the record was stated in the case of Nyamogo & Nyamogo v Kago [2001] EA 174 that there is a distinction between a mere erroneous decision and an error apparent on the face of record and that an error which has to be established by long 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.
21. The issues raised by the Appellants before the Court was that the same misapprehended the importance of a letter by the provincial Administration on the existence of an access road, which to my mind may have been a good ground of Appeal and not an error apparent on the face of the record which should prima facie be visible and does not require any detailed examination as the Appellant wants to pursued the Court herein to so do.
22. It is also clear that the Respondent had preferred an Appeal against the Court's decision and the Appellants were at liberty to raise the issues as to whether the same was time barred in the said Appeal and not before the trial Court, further there is no rule which required that the Respondents to file submissions to the application, the Court was still under obligation to make determination based on the law and material evidence presented before it. I take the view and hold that the fact that the Court granted the orders to the Respondents did not preclude the Appellant from prosecuting the suit further.
23. The fact that the Respondents had preferred appeal against the substantive decisions of the learned magistrate, rises a doubt as to whether the right for review was still available in view of the provisions of Order 45 of the *Civil Procedure Act*.



24. I therefore find no fault with the trial Courts exercise of his discretion herein. It follows that the Appeal herein lacks merit and is therefore dismissed with cost to the Respondents.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 4th DAY OF JULY 2023

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kamba for Ms Mwai for 2nd Respondent

Ms Mbira for Mr. Kimwere for 1st Respondent

No appearance by the Appellant

Jackline – Court Assistant

