Nyaga v Ireri (Civil Appeal E024 of 2022) [2023] KEHC 20118 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E024 OF 2022

LM NJUGUNA, J

JULY 12, 2023

BETWEEN

JOHN MUCHANGI NYAGA ..... APPLICANT

AND

MARY IGOKI IRERI ..... RESPONDENT

RULING

1. Before this court is the application dated 06 January 2023, filed under certificate of urgency. The orders sought are as follows:

    a. Spent;

    b. Spent;

    c. That this Honourable Court be pleased to review and set aside its judgment/orders made on December 19, 2022;

    d. Spent;

    e. That the cost of this application be borne by the respondent in any event.

2. The applicant avers that the application for review has been filed in good time without delay and that the same ought to be considered by the court.

3. The applicant insists that throughout the lifetime of the court process, they have been in actual possession of the suit land and the same is fully developed and their occupancy remains at risk.

4. It is the applicant's case that the court failed to sufficiently analyze information on the green card produced in court, more specifically the figure "14000" to find out if indeed it was a payment whose receipt was acknowledged and its purpose and effect. Further, he argues that the court has not satisfactorily addressed itself on the issue of whether the land was joint tenancy and that the court ought to have retried the matter and considered oral evidence of the parties.

5. The applicant argues that the deceased Hellena Shiuthara Allan had expressed no interest in the land and was merely a "custodian" and the court should have considered this position when making its decision both in the trial and appellate courts.

6. The respondent filed her replying affidavit together with grounds of opposition terming the application as misconceived, frivolous, vexatious and an abuse of the court process. She argues that the application is fatally defective as it does not meet the threshold for review as stated in Order 45 Rule 1 of the *Civil Procedure Rules* 2010.

7. The respondent further stated that this court at this point lacks capacity to revisit the merits of the case as that lies with the court exercising appellate jurisdiction. That the court upon delivering the judgment or ruling becomes functus officio and cannot revisit the judgment on merits.

8. The court directed that the application be canvassed by way of written submissions.

9. In his submissions, the applicant sought to challenge the validity of the appeal in the first place stating that the memorandum of appeal was not endorsed with the court's stamp thus was not properly filed. Consequently, he makes reference to Order 42 Rule 10 of the *Civil Procedure Rules* 2010. The Applicant further avers that sections 62 and 63 of the *Evidence Act* cap. 80 were disregarded when the appellate judge failed to include oral evidence given at the trial court in making its decision.

10. The Applicant argues that the court proceeded with assumption in interpreting the "14,000" to mean an amount of money paid by the deceased to the lands office in order to be added as proprietor on the green card. For this argument, he citedsection 119 of the *Evidence Act* cap. 80 which gives circumstances when the court may presume facts. It is the Applicant's case that the court should have taken this position after considering the testimony of an expert witness from the lands office. Further, the issue of ownership of the Property Kaagari/Kanja/2885 has been brought into question by the Applicant, more specifically on the tenure of tenancy.

11. While challenging the judgment generally, the Applicant relied on Sections 1A and 1B of the *Civil Procedure Act* cap. 21 and article 159(2)(d) of the *Constitution* of Kenya 2010. He claimed that he (together with his family) have been occupying the suit land for more than 12 years and have a right to make a claim on it by way of adverse possession. The applicant also relied on the case of *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR to give strength to his argument that Rule 63 of the *Probate and Administration Rule*s allows him to approach this court for a review.

12. The respondent in her submissions confirms that the court has sufficient power to review as founded in Rules 49 and 63(1) of the *Probate & Administration Rules* and Order 45(1) of the *Civil Procedure Rules* 2010. However, she goes ahead to break down the circumstances under which an order for review can be made. They are as follows:

    a. That there has been 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

    b. That there has been some mistake or error apparent on the face of the record; or

    c. That there is any other sufficient reason.

13. The argument was further emphasized by the respondent by citing Justice Musyoka *In re Estate of Simoto Omwenje Isaka* (Deceased) [2020] eKLR where the learned judge held that an error apparent on the face of the record is determined judicially on the facts of each case. The court further agreed that where an error has to be established by long drawn process of reasoning or if a position adopted

by the trial court is a possible one, the same cannot be said to amount to an error on the face of the record. The error must be self-evident.

14. It was the respondent's argument that the application should be dismissed with costs as it does not measure up to the standard for review as set under Order 45(1) of the *Civil Procedure Rules 2010*.

15. I have carefully considered the application herein together with its supporting affidavit, therespondent's replying affidavit and grounds of opposition, written submissions by both the Applicant and Respondent as well as the relevant case law. I find that all the issues raised can be addressed easily once this court establishes its position on section 80 of the *Civil Procedure Act* cap 21., Order 45 of the *Civil Procedure Rules* 2010 and Rule 63 of the Probate and Administration Rules. There is no doubt that this court has been rightfully approached for review of its decision in a judgment dated December 19, 2022. The question is; has the applicant satisfied the threshold for review as envisaged in Order 45 of the *Civil Procedure Rules* 2010?

16. *In re Estate of Saverio Ruri Njuiri (Deceased)* [2021] eKLR the court stated as follows:

> " 25. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which imports Order 45 of the Civil Procedure Rules in probate matters. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in the said Order 45 of the Civil Procedure Rules (See *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR).
>
> 26. The requirements under Order 45 are to the effects that, to be successful, the applicant must demonstrate to the court that; -
>
> i. There has been 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
>
> ii. That there has been some mistake or error apparent on the face of the record; or
>
> iii. That there is any other sufficient reason."

17. In the same case, the Honourable Judge referred to *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243 which considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

> " In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

18. From the clarity of previous decisions and the provisions of Order 45 of the *Civil Procedure Rules* 2010, I find that the Applicant's case has satisfactorily met the threshold expected in law for the review to succeed. There is a sufficient cause.

19. On the Applicant's argument that the court ought to have relied on expert evidence to reach a different interpretation of the figure "14,000" I find as follows: According to paragraph 14 of the judgment dated December 19, 2022, the court relied on the testimony of the 1st respondent in the trial court to reach its finding. There is no record in the trial court file to show that the applicant challenged this position. Consequently, this issue cannot be dispensed with through the present application because that will mean re-opening the case for hearing, which power this court now lacks as it is now *functus officio*. To do so will also defeat the intention of section 80 of the *Civil Procedure Act* cap. 21 and Order 45 of the *Civil Procedure Rules* 2010 on the power of a court to review its decision. For this, I am in agreement with the holding in *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR where the court stated:

> " The doctrine of *functus officio* was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held that -
>
> "*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re-St Nazarire Co,* [1879], 12 Ch D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions."

20. Making reference to the immediate previous paragraph, I also find the Applicant's argument that he has a rightful claim in adverse possession, misplaced and cannot be addressed by this court since this court has no jurisdiction over matters, adverse possession.

21. In addressing the issue of whether or not the appeal was properly before the court because the Memorandum of Appeal was not date-stamped by the court, I note that this issue is being raised late in the day, noting that the appeal has already been determined. The Applicant participated in the appeal and should at the very least, have raised this issue during the pendency of the appeal, for consideration by the court.

22. Even then, I find this ground to be a procedural technicality set to derail the course of justice as envisioned in article 159(2)(b) of *the Constitution* of Kenya 2010, section 1A and 1B of the *Civil Procedure Act* cap. 21. In *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others* [2019] eKLR the court while addressing this nature of technicality stated as follows:

> " .....The said summons do not bear the registry stamp to show when they were filed. The fact however remains that the said documents are in the court file, thus they cannot be considered to be a nullity for lack of a court filing stamp. If at all they were not filed together with the plaint on April 27, 2018 that is a procedural technicality under the provisions of article 159 (2) (d) of *the Constitution* of Kenya, 2010..... it is my finding that in the circumstances surrounding this case, justice should not be sacrificed at the altar of procedural technicalities....."

23. The applicant prayed for costs. While considering the nature of the relationship between the parties herein, and noting the discretion bestowed upon this court, it is my view that each party bears his or her own costs.

24. In light of all the above, the court makes the following orders:

    a. That the applicant having failed to provide sufficient grounds for grant of the orders sought in the application dated 06 January 2023, the same is hereby dismissed.

    b. That each party shall bear his or her own costs.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents