



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 14 OF 2020

FRANCIS JAMES NDEGWA..... APPLICANT

-VERSUS-

SIMON GATHURA WANJOHI..... 1ST RESPONDENT

ANN NYAWIRA MUTHUI.....2ND RESPONDENT

RULING

1. By this Notice of Motion application dated 26th March, 2021, Francis James Ndegwa (*the Appellant*) prays for an order that the summary rejection of his Appeal dated 5th May, 2020 be set aside in the interest of justice and that the Appeal be allowed to proceed for hearing for justice to be seen to be done.

2. The application which is supported by an affidavit sworn by the Appellant is premised on the grounds, *inter alia*:

(i) *That Land Parcel No. Nyeri Block III/170 was not sold to the Respondents as no single documentary evidence, a receipt or bank paying slip was produced in court in the name of Juliet Wangui Ndegwa;*

(ii) *That according to the false sale Agreement, Kshs.4.1 million was paid in cash and in the Bank but Kshs.3.5 million was not paid.*

(iii) *That the sale was not completed within 90 days according to the law and the agreement;*

(iv) *That the addendum to the Agreement was written on 22nd February, 2019, some 10 months after the sale agreement which had no meaning in law; and*

(v) *That the certificate of lease was obtained by the Respondents 13 months and 13 days, after the sale agreement which indicates that the entire transaction is a shameless land fraud.*

3. The application is opposed by the two Respondents – Simon Gathura Wanjohi and Ann Nyawira Muthui. In a Replying Affidavit sworn by the 1st Respondent on his own behalf and on behalf of the 2nd Respondent who is his wife and filed herein on 12th May, 2021, the Respondents aver that the application is misconceived, frivolous, vexatious, bad in law and an abuse of the court process.

4. The Respondents further aver that the application is misleading and trying to introduce new grounds based on an unfounded truth and is meant to tarnish the judicial process and other personalities. The Respondents assert that the letters attached to the Appellant's supporting Affidavit are forgeries which were never produced or disclosed by the Appellant at the time of the trial.

5. The Respondents aver that the suit property was decreed to the Appellant's wife Juliet Wangui Ndegwa (now deceased) vide a Judgment delivered on 22nd November, 2016 in Nyeri HCCC No. 63 of 2010 and the Appellant who was the Defendant in the said case never challenged the decision. It is the Respondents case that the deceased thereafter properly sold the land to themselves following the transfer of the suit property into her name.

6. I have perused and considered the Appellant's application as well as the response thereto by the Respondents. I have similarly perused and considered the submissions filed by the parties herein all of whom were acting in person.

7. The proceedings herein originate from Nyeri CMCC No. 85 of 2019 where the Appellant herein sued the two Respondents in regard to the

suit property. By a Notice of Motion application filed in the said suit dated 13th December, 2019, the Appellant sought an order of stay of execution to be granted to stop the Respondents from demolishing a house or any other property within the suit property. In a Ruling rendered on 20th December, 2019, the Honourable F. Muguongo, SRM, found no basis for the said application and dismissed the same with costs.

8. Dissatisfied with the said Ruling, the Appellant lodged an 18-point Memorandum of Appeal herein dated 5th May, 2020 seeking to have the findings of the Learned Magistrate overturned. He also sought to have the certificate of lease in the name of the Respondents cancelled and a new one issued in his name and that of his wife Juliet Wangui Ndegwa who is said to have passed away on 9th January, 2020.

9. The said Appeal was placed before the Honourable Justice Y. M. Angima on 10th March, 2021 pursuant to **Section 79(B) of the Civil Procedure Act**. Upon perusal of the Appeal, the Learned Judge summarily rejected the Appeal having certified that there was no sufficient ground for interfering with the order appealed from.

10. By this present application, the Appellant urged this court to review the said orders with a view to setting the same aside in the interest of justice and to allow the Appeal to proceed for hearing.

11. **Section 79(B) of the Civil Procedure Act** provides:

“Before an appeal from a subordinate court to the High Court is heard, a Judge of the High Court shall peruse it and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may notwithstanding Section 79(C), reject the appeal summarily.”

12. It is in light of the above provision that the Learned Judge rejected the Appellant’s Appeal. On the question of review, **Order 45 Rule 1 of the Civil Procedure Rules** provides as follows:

(1) Any person considering himself aggrieved –

(a) By 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. In the matter before me, the Appellant does not claim that there is any discovery of any new or important matter or evidence which was not within his knowledge. Nor does he come to court on the basis that there was an error or mistake apparent on the face of the record.

14. On the contrary, the Appellant asserts that such summary rejection of the Appeal was tantamount to allowing theft of his property and promoting corruption and that hence the same should be set aside. In the supporting affidavit to the application, the Appellant goes on at length in an effort to demonstrate that his case against the Respondents should have been allowed by the subordinate court and that accordingly there was no basis for a summary rejection of the Appeal.

15. Arising from the foregoing, it was clear to me that the Appellant contends that in summarily rejecting his Appeal, the Learned Judge proceeded on an incorrect exposition of the law and hence reached an erroneous conclusion that the Appeal ought to be rejected. With respect, that cannot be a ground for a review of the orders made herein.

16. It is trite that an order, decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court or tribunal on a point of fact or law. In the exercise of its power of review, this court cannot sit on appeal over its own decision.

17. In the circumstance herein it is apparent to me that being dissatisfied with the decision made herein on 10th March 2021, the only avenue of redress available to the Appellant was to appeal against the same and not to come before this same court for a review of the orders.

18. In the premises, it is my finding that the application dated 26th March, 2021 is misconceived. I dismiss the same with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16TH DAY OF DECEMBER, 2021.

In the presence of:

The 1st Respondent acting in person

No appearance for the Applicant

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J. O. OLOLA

JUDGE