



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 56 OF 2015**

**JOSEPH MUGO GATITI.....APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. The appellant herein sued the respondent in Embu CM Civil Case No. 1 of 2014 for trespass by the respondent's employees on his Land Parcel No. 59 Riachana Adjudication section by passing power lines and installing their appliances without the plaintiff's consent or permission. He thus claimed for compensation for using the said land without consent, general damages, costs of the suit and any other relief which the court may deem fit and just to grant. This was as per the amended plaint which was amended on 8.04.2011. The respondent filed its statement of defence and wherein it denied the contents of the said plaint and further averred that the appellant herein was not the registered owner of the suit land but the same belonged to one Maringa Kiondo and from whom the respondents had obtained a consent. It further averred that the suit was incompetent and incurably defective for failure to comply with the provisions of Section 8(1) & (2) and 30(1) of Caps 283 and 284 respectively.

2. The matter proceeded ex-parte during which, the appellant (plaintiff) called one witness (Christine Mumo Mugo-PW1) and who testified in support of the plaintiff's case to the effect that the respondent herein entered the suit land and caused a lot of destruction and built a power line without authority. That the land belonged to the plaintiff and not Maringa Kiondo as he had sold the same to them (plaintiff and PW1). She produced the power of attorney (donating powers to her to testify on behalf of the plaintiff) and letter evidencing that the land belonged to her as PExbt 1 and PExbt 2 respectively. The plaintiff proceeded to close his case and the matter was reserved for judgment.

3. In the said judgment, the trial court found that the issue on trespass was never controverted but however found it would not award damages for loss of user as the same was never quantified. It further awarded Kshs. 10,000/- as nominal damages on the grounds that the appellant herein did not persuade the court as to how much he was entitled to. The court further awarded the plaintiff the costs of the suit and interests from the date of filing the suit.

4. The appellant proceeded to file an application dated 24-08.2014 seeking review of the judgment of the trial court on the grounds that the amount awarded was too little as the judgment did not take care of the loss incurred for loss of user of the land. The appellant (applicant in the said application) deposed that after the hearing of the suit, he sent his advocate on record to file a valuation report in court showing the amount due for the area taken by the wayleave and which was received at the registry but the said report was not taken to the magistrate who heard the matter. That if the trial court had seen the report, the amount awarded in the judgment would have been more. The said application was heard before R.O Oigara P.M and in the ruling delivered on 6.11.2015 the Learned Magistrate in dismissing the application held that there was no prove of a new and important evidence after the exercise of due diligence. The Learned magistrate proceeded to dismiss the application with costs.

5. The appellant being dissatisfied with the said ruling delivered by the trial court D.A Ocharo Ag. PM in Embu CM Civil Case No. 1 of 2014 filed the instant appeal and which was commenced by way of a memorandum of appeal dated 4.12.2015 and wherein he raised three (3) grounds of appeal to wit;

***1. That the learned trial magistrate erred in law and in fact by being guided by mere technicalities at the expense of substantive justice in finding that the application dated 29.08.2014 was improperly before court for the reasons that no decree had been extracted***

***2. That the learned trial magistrate erred in law and in fact in failing to consider the fact that the valuation report was properly filed in court following an order of the court that the same be filed so as to guide the court on appropriate award for loss of user.***

***3. That the appellant reserves the right to add to, omit or combine any of the grounds listed.***

6. As such the appellant prayed that the appeal be allowed with costs to him against the respondent.

#### **B. SUBMISSION BY THE PARTIES**

7. Directions were taken that the appeal be dispensed with by way of written submissions. However, the respondent did not file its submissions but the appellant filed his.

8. The appellant submitted that despite the valuation report having been filed in court, the Executive Officer of the court failed to take the report to the magistrate who heard the case so as to enable the magistrate read and award the correct amount as per the said report and as such the appellant should not be punished for the mistake of the court staff who failed to do his duty by failing to file the report. That the said report was not opposed and as such the appellant ought to be awarded the correct figure of compensation as per the said report. As such the appeal should be allowed and proper damages be awarded to the appellant and since the appeal is not opposed, the same ought to be allowed.

#### **C. RE-EVALUATION OF EVIDENCE AND ISSUES FOR DETERMINATION**

9. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. (See **Abok James Odera t/a A.J Odera & Associates –vs- John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR**). The court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally ( See **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123**).

10. I have definitely re-evaluated the evidence before the trial court as can be seen hereinabove and further considered the grounds of appeal postulated herein and the appellant's written submissions. This being an appeal from a ruling, it is definite that this court does not need to give allowance to the fact that it did not see the witnesses and the demeanor as no witnesses testified. Nonetheless, it is my considered view that the only issue for determination is whether the appeal is merited.

11. I note that the appellant herein in applying for review of the trial court's judgment was invoking the trial court's exercise of its discretionary powers (as section 80 and Rule 45) talks of "may" as opposed to shall. The circumstances in which an appellate court can upset the exercise of a discretion of a trial (court) are now settled and as a legal requirement, this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See the case of **Mbogo and Another v Shah [1968] EA**). This is because to infringe upon the discretionary power of the trial court, would be tantamount to a judicial review of the decision of another Court's decision and would be considered, or viewed as, an interference in another Court's judicial independence and exercise of discretion. (See **Francis Wambugu -vs- Babu Owino & others, SC Petition No. 15 of 2018**).

#### **D. DETERMINATION OF THE ISSUE**

12. As I have already noted, the ruling which precipitated this appeal was from an application for review of the judgment delivered by the trial court on 27.08.2014. The said application was brought under Order 45 of the Civil Procedure Rules and which is the correct legal provision on review. The question therefore is whether the trial court can be faulted for failing to review its judgment.

13. Review in civil procedure is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules 2010. Section 80 gives the power of review while Order 45 sets out the rules. Section 80 provides as follows: -

***80. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

14. Order 45 Rule 1 on the other hand provides as follows: -

***45 Rule 1 (1) 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."***

15. It is therefore clear that the law limits review to the following grounds-

- a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*
- b) on account of some mistake or error apparent on the face of the record, or*
- c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.*

16. From the perusal of the application before the trial court, it was deposed on behalf of the appellant that the court did not take care of the loss incurred for the loss of user of the suit land as a result of the actions of the respondent. It was deposed that after the hearing of the suit, the valuation report was filed in court but which report was not taken to the trial magistrate and as such he did not consider the same while writing the judgment and that if the same was considered, the award would have been more. The appellant as such invited the trial court to look at the report and review the amount awarded upwards.

17. In my considered view, the appellant did not satisfy the conditions for review as set out above. There is no way the trial court can be said to have made an error apparent on the face of record in its judgment as the report which was the basis of the application was not in the court record at the time of writing the judgment. The appellant confirmed that the same was not taken to the Learned Magistrate. As the procedure, documents are produced as exhibits at the hearing of the suit. The said report was never produced before the court. I am guided by Mativo J's decision in **Republic -vs- Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR** where the Learned Judge upon considering a number of authorities on review held that; -

“.....

*vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent....”*

18. It is my view that even if the said report was brought to the attention of the trial court after the hearing of the appellant's case, the same could not have been considered as evidence in court for reasons that it had not been admitted as such. As such, it is my considered view that there was no error apparent on the face of the record.

19. But can the appellant be said to have sought review on the basis of discovery of new evidence being the valuation report? My answer is no. For a review to be allowed on this ground, the applicant (appellant in this case) has a duty to satisfy the court that there was 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. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier. {See **Republic.-vs- Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another (supra)**}. In the instant case, the appellant did not prove to the court that the report was not within his knowledge and even after exercise of due diligence, the same could not be produced. As such the application could not have seen the light of the day.

20. Further the appellant did not plead or prove any other sufficient reason.

21. The appellant raised a ground to the effect that the learned trial magistrate erred in law and in fact in failing to consider the fact that the valuation report was properly filed in court following an order of the court that the same be filed so as to guide the court on appropriate award for loss of user. However, in his own admission, the appellant submitted that the Court's Executive Officer failed to take the report to the magistrate who heard the matter. This was also deposed in the affidavit in support of the application which was before the trial court. It is my considered view that the said report was not properly filed and neither was it on record at the time of the hearing of the suit. The court cannot therefore be blamed for having not considered evidence which was not produced.

22. Taking into account the above, the trial court's decision was not wrong and neither did the Learned trial magistrate misdirect himself nor did he act on matters on which he ought not to have acted. The trial court's exercise of discretion cannot as such be faulted by this court as it applied the correct legal principles and the same is evident from the impugned ruling.

23. In the end, I find that the appeal has no merit and it is hereby dismissed.

24. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent