REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA CASE NO. 32 OF 2018

JUMA ATHMAN KUMALA

MOSES ROTICH

ABDALLA RASHID KUGOTWA

(Suing on behalf of residents of Kisimani).....APPELLANTS

VERSUS

1. IBRAHIM MUSA (Suing on behalf of Sheikh Ali Taib)

2. LAND REGISTRAR

3. COUNTY GOVERNMENT OF MOMBASA

4. DISTRICT SURVEYOR.....RESPONDENTS

JUDGEMENT

The Appellant not being satisfied with the ruling of the Chief Magistrate in respect of the Interested Party's application dated 11th June 2018 and delivered on 7th December 2018 in Mombasa CMCC No. 1319 of 2014 appeal to this court on the following grounds;

1. THAT the Learned Magistrate misunderstood and misapplied the law by stating that the Appellants herein as aggrieved parties ought to file a different and separate suit to separate their interests.

2. THAT the Learned Magistrate-erred in failing to grant the appellant an opportunity to be heard yet it had issued drastic; adverse and draconian orders against them.

3. THAT the Learned Magistrate failed to appreciate, evaluate the cogent reasons/grounds for review as advanced by the Interested Party/Applicant.

4. THAT the Learned Magistrate misconceived the law on entry of interlocutory judgment, striking out an existing defence and dealing in a defence filed albeit out of time. Specifically, the Magistrate misapplied the law when he declared that the 2nd Defendant had not filed a defence yet there was a statement of defence on record.

5. THAT the Learned Magistrate erred in law in holding that it is possible to issue adverse orders against a party who is not a party to the suit without according them an opportunity to be heard.

6. THAT the Learned Magistrate misconceived the law and facts in directing parties who are not in possession of the property to give vacant possession,

7. THAT the Learned Magistrate failed to appreciate the principles for setting aside judgement which was irregular and wrongfully entered.

8. THAT the Learned Magistrate grievously erred in law and misdirected himself in law and fact in coming to the conclusion he did

and in dismissing the Appellant's application for review.

9. THAT the Learned Magistrate erred in fact and law in failing to appreciate the crucial legal issues that emanate in the Appellant application dated 11th June, 2018.

The Appellants urge this Honourable Court;

1. For an order that the Appellants' appeal be allowed in its entirety.

2. For an order that the Ruling and subsequent orders of Hon. J. Nang'ea of 7th December, 2018 be discharged and replaced with an order allowing the Appellants' application dated 11th June, 2018.

3. Costs of this appeal.

The respondents submit that the Appellants have sought to be enjoined as parties to the suit herein after judgment has been delivered. They claim that they are the rightful owners of the land and they demand that the proceedings be set aside to enable them have their day in court to defend the suit. However, in the supporting affidavit sworn by one Juma Athumani Kumala dated 11th June,2018, 46 names of individuals have been listed on Annexure 1 of the Appellants' supporting Affidavit as the Appellants but only 5 letters and 5 copies of Title Deeds have been attached for this Honourable Court's attention.

Further at paragraph 4 of the supporting Affidavit, the Appellants state that they were allotted the property by the government and that some members are in the process of securing title deed as they have already been issued with allotment letters. The said Title Deeds and allotment letters also indicate completely different plot numbers which are not the subject of this suit. It is therefore evident that the suit Plot No. L.R. MN/1/9856 is completely distinct from the properties that form the subject of this Appeal hence this Honourable Court cannot set aside a judgment which touch on absolutely different plot numbers. Further, the author of allotment letters and the said Title Deeds have been indicated thereon as the Land Adjudication and Settlement Officer and the Lands Registrar hence the 1st Respondent rightfully sued the Government of Kenya in a bid to obtain vacant possession as it had the direct link on settling squatters on the 1st Respondent's Land. In view of the foregoing, they submit that the Honourable Court correctly aligned himself to the facts and the evidence which were adduced in court on 9th October, 2017 and justly directed the Appellants to file a separate suit. To wit the Land Surveyor who introduced herself as one Rachel Matheu an employee at the National Government as a Land Surveyor in the Ministry of Lands testified. She stated that she was served with a court order to establish the location of Plot No. LR. MN/1/ 9856. She confirmed that she traced only one beacon but the other three were falling under houses on the land. On cross examination she confirmed that the buildings are occupied by residential and commercial premises. That the Lands Registrar Mr. Anthony Mwadime also confirmed that to date the suit plot herein is registered in the name of Sheikh Ali Taib Bajaber, the 1st Respondent herein The Land Registrar also confirmed on cross examination that the Plaintiff is the rightful owner of the Land and produced the Original Title Deed as Exhibit 3. The Land Registrar further adduced evidence that any other person who is in passion of the said land other than the Plaintiff, the 1st Respondent herein, was a trespasser and/or unlawfully acquired land.

This court has considered the appeal and submissions therein. The Appellants in their application have sought to be enjoined as parties to the suit herein after judgment has been delivered. They claim that they are the rightful owners of the land and they demand that the proceedings be set aside to enable them have their day in court to defend the suit. The Applicants have sought to be enjoined in the Appeal after judgment had been delivered. The provisions of order 1 rule 10(2) of the Civil Procedure Code provide as follows:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

In *Central Kenya Ltd vs Trust Bank & 4 Others, CA NO. 222 of 1998*, the court affirmed that the guiding principle in amendment of pleadings and joinder of parties is that;

"All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

The appellants however had not applied solely to be added as a party to the suit; they had also applied for review and setting aside of the judgment of the court to give them an opportunity to be heard. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

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

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

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

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. The Appellants submitted that there was new evidence in the matter that the trespassers had been issued with new titles deeds by the government. There was also an error on the face of the record as the court did not satisfy itself that the 2nd defendant was properly served before entering interlocutory judgement against the 2nd defendant. I have perused the said application whose ruling is being appealed against and find that, in the supporting affidavit dated 11th June, 2018, 46 names of individuals have been listed on Annexure 1 of the Appellants supporting affidavit as the Appellants but only 5 letters and 5 copies of Title Deeds have been attached for this Honourable Court's attention. The description on the titles is different from the subject matter in this suit. If it is the same on the ground it would appear the description has changed and or they are different parcels of land. I find this would raise a different cause of action and the parties if at all cannot be enjoined at this late stage. In the case of *Mrao Ltd. vs. First American Bank of Kenya Ltd. & 2 others (2003) eKLR* it was held that;

"An appellate court may only interfere with exercise of judicial discretion if satisfied either;

a) The judge misdirected himself on law, or

b) That he misapprehended the facts or,

c) That he took account of considerations of which he should not have taken an account, or

d) That he failed to take account of considerations of which he should have taken account, or

e) That his decision, albeit discretionary one, was plainly wrong."

I find no error in the trial magistrate's ruling in this matter. I find no new evidence that has come to light and no error on the face of the record. I find that this appeal is not merited and I dismiss it with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7TH DECEMBER, 2021

N.A. MATHEKA

JUDGE