REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO 12 OF 2017

MOHAMED OMAR .....APPELLANT

VERSUS

MOHAMED ABUBAKAR ALI .....RESPONDENT

(Being an appeal from the ruling and order of Principal Magistrate Hon. H. Nyakweba delivered on the 21st day of December, 2016 in CMCC (Msa) No. 2013 of 2013, between Mohamed Abubakar Ali vrs Mohamed Omar).

RULING

1. This is an appeal against the ruling delivered on 21st December, 2016 by Hon. NYAKWEBA, Principal Magistrate (as he then was in Mombasa CMCC NO. 2031 of 2013 allowing the Respondent's Application dated 22nd January, 2015.

2. The Respondents in the said application had sought for:

(a) spent;

(b) that the judgment delivered by the court on 23rd October 2015 be reviewed so that the amount decreed by the court carries interest at the prevailing court rates form 17th August, 2009 up to the date the decree will be satisfied.

(c) that the costs of this application proved for

3. The judgment sought to be reviewed was delivered in a suit instituted by the Respondent against the Appellant for a refund of his money paid to the appellant in respect of purchase of land, which the Respondent felt was taking too long to materialize vide a plaint dated 7th September, 2012. In the plaint, the Respondent prayed or a refund for Ksh 1,200,000/= together with interest at the rate of 12% from 17.8.2019 from the appellant. The appellant filed a defence ide a statement of defence dated 22.10.2017.

4. The suit was heard by Hon. KITAGWA (RM) who delivered her judgment on 23.10.2015 in which the appellant was ordered to refund the Respondents his said sum of Ksh 1,200.000/= together with costs of the suit but was not awarded interest. The Appellant paid the said sum of money and requested for the complation of costs through the Appellant's counsel vide a letter dated 22.1.2016.

5. This is what prompted the Respondent to file an application for review vide a notice of motion dated 22.1.2016. A replying affidavit was filed by the appellant on 21.3.2015 and application eventually heard interparties by Hon NYAKWEBA (PM) who deliver a ruling on 21.12.2016, in which he allowed the prayer for review of judgment delivered on 23.10.2015. He entered judgment for the plaintiff against the defendant in the sum of Ksh 1,200,000/= together with interest at court rates from the date of the suit being 20.9.2012 until payment in full. He also ordered the plaintiff to have costs of the suit.

6. This was arrived at on the ground that according to the agreement dated 17th August, 2009, the defendant was to make all necessary arrangement to subdivide and transfer the property to the plaintiff's name but he defaulted to do so within reasonable time, and had not even done so on 23rd Otober,2015, when judgment was delivered. Hon Nyakweba found this default serious, hence sufficient reason to cause the judgment delivered reviewed.

7. It is against these findings and decision that the appellant has filed the instant appeal where he has set out four (4) grounds in his Memorandum of Appeal dated and filed on 19th January 2017. That;

(a) The learned principal magistrate erred in law and fact in failing to observe and appreciate that the only issue which was before the trial magistrate, Hon Kitagwa SRM, for consideration, was whether the Respondent was entitled to costs and interest, since the Appellant was not averse to the issue of a refund of the Ksh 1,200,000/= which the Respondent claimed

in the suit, and of which the said trial magistrate made a decision on, and gave reasons for her decision.

(b) By holding that " in my view where time is not the essence of contract, parties thereto must perform their part within a reasonable time. According to the agreement of 12.8.2009, which is the basis of the main suit herein, the defendant was to make all the necessary arrangements to subdivide and transfer the property to the plaintiff's name. He defaulted to do so within reasonable time and had not done so at the time of judgment on 23.10.2015. This was a serious default on his part" the learned principal magistrate erred in law and fact in reconsidering issues which had been considered by the trial magistrate, Honourable Kitagwa SRM, when passing her judgment.

(c) The learned principal magistrate erred in law and fact in overruling the decision of the trial magistrate, Honourable Kitagwa SRM, thereby sitting as an appellate court on a matter arising from a court of concurrent jurisdiction .

(d) The learned principal magistrate erred in law and fact in considering extraneous issues which were never raised by the Respondent, either in his application for review dated 22.1.2016 or in his written submissions, and were never canvassed before him by any party.

In his appeal, the appellant prays that the appeal be allowed, the ruling of the subordinate court be varied accordingly and notice of motion dated 22nd January, 2018 be dismissed.

8. The counsel for the parties agreed to dispose of the appeal by way of written submissions and both parties filed their written submission on 24th January 2018. The same were highlighted on 12th February 2019

APPELLANT'S SUBMISSIONS.

9. The appellant, though, Mr. Odongo B. O counsel opted to argue the four grounds in the memorandum of appeal separately. With regard to the first ground the appellant counsel submitted that the only issues for determination is whether interest was payable as was pleaded in the plaint and who was entitled to the costs of suit since the appellant admitted he was very much willing to refund the purchase price. He submitted that the learned magistrate in her judgment arrived at a finding that time was not of essence and the Respondent was not entitled to interest sought and expressly declined to grant the same, so that if any party felt aggrieved by this decision , they were free to seek recourse in an appeal and not a review.

10. The appellant counsel went on to submit that Hon Nyakweba was wrong in treating the reasoning by Hon Kitagwa as an error on the face of the record, considered her reasoning more superior and dismissed and or set aside the judgment, which he replaced with his own, an act that amounts to having given himself appellate powers over a matter that arose in a court of consistent jurisdiction.

11. In conclusion, the learned counsel for the appellant submitted that the application for review had nothing new and important, mistaken or with error apparent on the face of the record, hence did not meet the known requirements for a reviewed application to succeed.

RESPONDENT'S SUBMISSIONS.

12. The Respondent, through their counsel, Hon WILLIAM ONDIEKI submitted that Hon. KITAGWA refused to award, interest from 17th August,2009 because, according to her, the agreement did not prescribe timeless within which the transaction was to be completed. He stated that the decision was in disregard to the provision of Section 60 of the Evidence Act where the courts are required to take judicial notice of matters of common notoriety. He also stated that the court failed to consider the doctrine of unjust enrichment.

13. Counsel for the Respondent also submitted that it was none efficacious to apply for review and more so considering the casual manner in which Hon. KITAGWA dealt with the issue of interest. He cited the court of appeal decision in the case of **WANGECHI KIMITA and ANOTHER VRS MUTAHI WAKABIRU (1977) e KLR,** where the court appreciated the fact that "any other sufficient reason" in order to open the door for review was quite wide.

14. In conclusion, counsel for the Respondent submitted that costs and interest, in all fairness, should have followed the event but since HON. KITAGWA failed to appreciate this principle, it was unjust and proper to invite the same court to review its judgment under "any other sufficient cause". He placed reliance on the case of **MISTRY AMAR SINGH VRS SERWANO WOFUNIRA KULUBYA UCA No. 74** of 1960 which dealt with the consequences of illegality in the following words.

" Ex Turpi causa Non Oritio Actio. This old and well known legal maxim is founded in good sense and expresses clear and well organized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the attention of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the plaintiff has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him".

15. In determining this appeal, I have considered the grounds raised in the memorandum of appeal viz a viz the application by notice of motion dated replying affidavit dated 21st March,2016 submission by both the counsel, cited authorities and the law. I find that the only issue for determination is whether, in over ruling the decision of HON. KITAGWA, HON. NYAKWEBA sat as an appellant court on a matter arising from a court of concurrent jurisdiction **ANALYSIS AND DETERMINATION**

16. As regards an application for review and or setting aside of a judgment or decree, the applicable law is found under Section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides 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."

17. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the ground upon which a judgment or decree can be reviewed and or set aside. It states;

Any person considering himself aggrieved;

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(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."

18. In the case of **RUHANGI VRS KENYA REINSURANE COPORTAI, CIVIL APPEAL NO 208 OF 2006 (Unreported)**

The learned HON. NYAKWEBA in considering whether the application dated 22nd January, 2016 for review met the threshold for the same, relied on the ground of "any other sufficient reason". He went on to disagree with the finding of HON. KITAGWA on the issue for interest which the said magistrate had considered and ruled that interest was not awardable since there was no provision of time lines in the contract between the parties.

19. In Mulla, The Code of Civil Procedure Vol. III pages 3652 3653, it states:

" The power of review can be exercised for correction of a mistake and not to substitute a view such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of appeal and have to be strictly conformed to the scope of order 47 Rule of Code of Civil Procedure…..

The review court cannot sit as an appellate court. Mere possibility of two views is not a ground for review. This re-assessing evidence and pointing out defects in the order of the court is not proper".

20. In the case of **NYAMONGO & NYAMONGO ADVOCATES VRS KOGO E.A (2001) 173 at page 174-5,** the court of appeal in part stated as follows:

"Again, if a view adopted by the court on the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error of wrong view is certainly no ground for review although it may be for an appeal. As was said in the A.I.R commentaries on the Code of Civil Procedure by Chitaley and Rao (4th Edition Vol. 3 at 3227."

"A point which may be good ground for appeal may not be a ground for an application for review. This an erroneous view of evidence or of law is no ground or a review though it may be a good ground for an appeal".

21. In going through the Respondent's application dated 22nd January, 2016 I find that it did not satisfy the conditions for grant of review as there was no discovery of new and important matters or evidence and a mistake or an error apparent on the face of the record that required to be corrected. In regard to review jurisdiction the court of appeal in the case of **RUHANGI VRS KENYA REINSURANCE CORPORATION, CIVIL APPEAL NO 208 OF 2006** (unreported) stated;

"It is important to bear in mind that Order 44Rule 1 (now order 45 Rule 1) of the Civil Procedure Rules sets out the purview of the reviewed jurisdiction. A point outside that purview is not a ground for review. A pint which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or mis- construed statute or other provision of law is no ground for review. All these are grounds of appeal".

22. It is this court's view that the act of HON. NYAKWEBA overruling the finding on interest by his sister, HON. KITAGWA was equivalent to a review court sitting as an appellate court on a matter arising from a court of concurrent jurisdiction. And so, HON. NYAKWEBA's determination on 21st December, 2016 could not be construed being grounded on "any other sufficient reason" since he overruled a finding on the issue of interest by his sister and considered his reasoning as being superior.

23. The Respondent having been aggrieved by the learned magistrate's interpretation and or application of the law on the issue of interest, the recourse was not in seeking a review of that decision but ought to have appealed against the decision since the trial court had become

functus officio after its decision was rendered on the said issue on 21st October, 2015.

24. I am satisfied that the learned principal magistrate HON. NYAKWEBA erred in overruling the finding by HON. KITAGWA (RM) by allowing the notice of motion application dated 22nd January, 2016 as he clearly lacked jurisdiction to sit on an appeal on a judgment delivered by his colleagues of concurrent jurisdiction on 23nd October, 2015.

25. According, and for all the reason outlined above, this appeal is allowed with costs to the Appellant. The lower court ruling delivered on 21st December, 2016 is hereby set aside and the Respondents lower court application dated 22nd January, 2016 dismissed with costs.

Orders accordingly.

Delivered, dated and signed this 5th day of April, 2019.

LADY JUSTICE D. O. CHEPKWONY