REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 5 OF 2018

BONIFACE KIVINDYO MUTISYA.....PLAINTIFF/ RESPONDENT

-VERSUS-

ALFRED KAVILA KIVINDYO.....1ST DEFENDANT

CONSOLIDATED BANK LTD.....2ND DEFENDANT/APPLICANT

ALMA SOLUTIONS LTD.....3RD DEFENDANT

RULING

1. The application for determination is dated 15/05/2019. It was filed under certificate of urgency and is brought under Articles 10 and 159 (2) (b) and (d) of the Constitution of Kenya 2010, Section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 21 Rule 6, Order 45 Rules 1, 2 and 5 and Order 51 Rules 1 and 8 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law). It seeks the following orders;

a) That this honourable court be pleased to review the judgment delivered on 12th November, 2018 ordering the return of land reference number Mbooni/Liani/107 and dismiss the Plaintiff's entire suit with costs.

b) The court be pleased to find that land reference number Mbooni/Liani/107 was charged to the 2nd Defendant together with land reference number Mbooni/Liani/884.

c) In the alternative, this court be pleased to reopen the suit herein limited to taking evidence on the existence of and validity of a charge over land reference number Mbooni/Liani/107.

d) Any other orders as the court may deem fit in the interests of justice.

e) Cost of the application

2. The application is supported by the grounds on its face and the supporting affidavit of Albert Anjichi sworn on the same day. He deposes that the Applicant *(the bank)* holds a valid charge over LR. No. Mbooni/Liani/107 *(the land)* and the title thereof should not be released to the Respondent as per the judgment of this court delivered on 12/11/2018. That failure to plead and lead evidence on the existence of the charge was an innocent omission due to staff transfers or resignations.

3. He deposes that there is an error apparent on the face of the record as well as sufficient reason to review the judgment. That if the bank is compelled to release the title to the land, it will not be able to recover the debt owing due to inadequacy of the remaining security.

4. He also deposes that no evidence was placed before the court to enable it make a conclusion that the land was not charged. That the issue was not considered in evidence and neither an official search nor abstract of title shown to the court.

5. **Mr. Waigwa,** counsel for the Applicant filed written submissions which he highlighted. With regard to 'error apparent on the face of the record', the counsel submitted that the Respondent's list of documents dated 15/11/2016 contained an official search showing that the land had been charged to the bank for Kshs.2 million. The bank submitted that the Respondent executed a legal charge dated 17/04/2012 in its favour to secure lending to the 3rd Defendant.

6. It relied on the case of **Nyamogo & Nyamogo –vs- Kogo (2001) EA 170 cited in Veleo (K) Ltd –vs- Barclays Bank of Kenya Ltd**

(2008) eKLR where the court held as follows;

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and error apparent on the face of the record. Where an error on a substantial part of law states one on 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 a long process of reasoning 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 apparent on the face of the record even though another view was possible."

7. The Applicant submitted that there was noncompliance with Order 21 Rule 6 of the Civil Procedure Act which requires that; where there is a prayer for judgment the grant of which would result in some alteration to the title of land registered under any written law concerning registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.

8. With regard to 'any other sufficient reason', the bank submitted that the 3rd defendant remains indebted to it for the sum of Kshs.3,154,725.73/= and that the court should review its decision for the sufficient reason that the land is lawfully charged. It relies on **Stephen Gathua Kimani –vs- Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR** where the court stated as follows;

> *"Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that 'the expression sufficient reason' is wide enough to include misconception of fact or law by a court or even by an advocate."*
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> *Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule1), states that 'sufficient reason' means a reason sufficiently analogous to those specified in the rule.*

9. It further relied on **Shanzu Investments Ltd –vs- Commissioner for Lands (Civil Appeal No. 100 of 1993** where the Court of Appeal stated;

> *"any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act ….. and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."*

10. The bank also submitted that it is willing and ready to have the hearing re-opened and be specifically limited to taking of evidence on the existence and validity of the charge. It pleaded with this court not to condemn it and states that it would suffer extreme prejudice if the land is returned to the Respondent without paying the debt towards redemption of the property.

11. The Respondent filed eight grounds of opposition dated 28/5/2019. The gist of the opposition is that the application does not meet the threshold for review and that granting the orders will amount to assisting the Applicant strengthen the weak part of its case. He also contends that the application was filed six months after the judgment and there has been no explanation for the delay. Further, he contended that the orders sought offend the provisions on res judicata.

12. **Mrs. Nyaata** for the Respondent also filed written submissions which were highlighted. She submitted that a party wishing to have a decree or order reviewed must satisfy either of the conditions stipulated in Order 45 Rule 1 of the Civil Procedure Rules to wit;

> a) Discovery of a 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.
>
> b) A mistake or error apparent on the face of the record.
>
> c) The application must be made without unreasonable delay.
>
> d) Any other sufficient reason.

13. The Respondent submitted that the first condition had not been met because the Applicant had admitted that the document/evidence sought to be introduced at this stage was within its knowledge though innocently omitted at the time of filing its pleadings.

14. On the second condition, she submitted that since it had produced a certificate of official search showing that the land had been charged, the court ought to have found that the charge was legal. That the issue was neither pleaded nor evidence tendered and the court used what was tabled before it to decide on the issue. He denied there being an error apparent on the face of the record.

15. On the third condition, it was submitted that the court pronounced itself on the issue of the charge over the land at paragraph 46 of the judgment and that the Applicant should have appealed if it was aggrieved by the decision.

16. On the last condition, counsel submitted that the application was brought 6 months after delivery of the judgment and the delay had not been explained. He contends that the same is inexcusable and urges the court to find as much.

17. Finally, on the issue of res judicata, she submitted that the Applicant's defence, counter claim and evidence of DW1 was with regard to

LR. Mbooni/Liani/884 only yet he had sued in respect to two parcels of land. That failure by the Applicant to expressly deny all the allegations raised in the suit stops it from raising the issue again.

Analysis and Determination

18. The right to apply for review is provided for in Section 80 of the Civil Procedure Act and elaborated by Order 45 of the Civil Procedure Rules as follows;

Order 45, Rule 1: Application for Review of decree or order.

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

19. There are three limbs which are discernible from part (b) above i.e;

a) Discovery of new and important matter or evidence.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

20. The Plaintiff's/respondent's case was that his parcels of land to wit Mbooni/Liani/107 and Mbooni/Liani/884 (the suit properties) were charged in favour of the bank at the instance of his son (1st Defendant). He prayed inter alia for discharge of the charges registered on the suit properties. Evidently, this is an acknowledgment that there were charges on both properties.

21. As can be noted at paragraph 46 of the judgment, the court relied on the defence in determining that only Mbooni/Liani/884 had been charged however, from the Respondent's list of documents dated 15/11/2016 there is an official search showing that the land was charged in favour of the bank on 03/05/2012.

22. Exhibit AA1 annexed to the Applicant's affidavit shows that indeed the charge was registered on 03/05/2012. The respondent does not dispute the existence of the charge. Accordingly, the omission by the Applicant in its pleadings and evidence does not negate the existence of the charge on Mbooni/Liani/107.

23. Further, execution of the decree herein will require alteration of the title of land by discharging the charge yet a certified copy of the title was not produced to the court as per the provisions of Order 21 rule 6. This is evidence that ought to have been placed before the court as it was in existence. It cannot be said to be new evidence.

24. On the issue of res judicata, it is evident from the judgment that the court concentrated on the charge on Mbooni/Liani/884 only. The rights of the parties with regard to the charge on Mbooni/Liani/107 were not determined on merits. This too can't be a ground for review by a judge who did not hear the matter.

25. Having looked at exhibit AA1 vis a vis the charge document with regard to Mbooni/Liani/884, it is evident that the two instruments were executed on the same day, registered on the same day, prepared and witnessed by the same advocates. The validity of the charge on Mbooni/Liani 107, had to be determined but it was not.

26. From my above analysis, it is clear that the Applicant is raising very pertinent issues, which ought to have been determined by the trial court but were not. For them to be placed into proper perspective the Applicant should have filed an appeal against the judgment.

27. To deal with all the issues raised in this application would mean getting into the merits of what the findings of the Hon. Judge were. The best placed court to handle that would be a court with higher jurisdiction, than this one. The doors are still open for the Applicant to do so. For now, I find the application not to be meritorious and I disallow it.

Costs to the Respondent.

DELIVERED, SIGNED AND DATED THIS 4TH DAY OF JULY, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE