



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C APPEAL NO. 24 OF 2019

HARON OBONYO OKERO.....APPELLANT

VERSUS

VINCENT MATARA ONCHOKE....RESPONDENT

(Being an appeal from the Ruling and order of Hon. S.K. Onjoro - SRM dated 22nd September, 2017 in original KISII CMCC No. 508 of 2015)

JUDGMENT

INTRODUCTION

1. The appeal before me is against the Ruling of Hon. S.K. Onjoro SRM dated 22nd September, 2017 on an application for review brought under Order 45 Rule 1, 2 and 3(2) of the Civil Procedure Rules.

BRIEF BACKGROUND

2. The Appellant's claim against the Respondent before the lower court was that on 18th September 2013 the Appellant and Respondent entered into a land sale agreement. The Appellant had the intention of acquiring L.R. NO. CENTRAL KITUTU/DARAJAMBILI/625 ('*the suit property*'). He claims that on execution of the sale agreement, Kshs 1,800,000/- was paid to the Respondent and the balance of Kshs 800,000/- was paid in accordance with the terms of the agreement. According to the terms of the agreement, any breach occasioned by either party entitled the innocent party to Kshs 5,000,000/- in addition to any other court remedy. Upon completion of the payments the Respondent was to handover all the requisite documents to facilitate the transfer of the suit property to the Appellant. The Appellant claims that the title by the Defendant was fake and incapable of passing a good title to him. The Appellant in his prayers sought the following reliefs;

- a) Refund of Kenya Shillings Two Million Six Hundred Thousand (Kshs. 2,600,000) and damages for frustration of the Agreement.
- b) Costs of the suit and interest from the date of filing.

3. The Respondent filed his defence denying the allegations in the plaint and claimed that he genuinely thought that he sold the suit property to the Appellant as per their agreement dated 18th September 2013 after the appellant paid Kshs 2,500,000/- He claimed that he transferred the suit property to the Appellant and the Appellant was issued with a title deed. He alleged that if there was any deregistration by the Land Registrar, then it is the Land Registrar that should be held liable.

4. At the hearing before the trial court Haron Obonyo Okero testified as PW1. He testified that at the time of sale he was availed documents, being the green card and title deed, suggesting that the suit property belonged to the Respondent. He paid the purchase price, processed the transfer and was issued with a title deed. He testified that in April of 2015 he visited the suit property and found Jeremiah Masese in possession and the said person claimed ownership of the land since 1997. He testified that as a result of the development he visited the Land Registry, conducted a second search and indeed found that the land was registered in the name of the said Jeremiah Masese. He told court that he reported the matter to Kisii Police Station and the Respondent was charged. Henry Maraga Nyaberi (PW2) testified that he was a witness to the sale agreement between the Appellant and Respondent and confirmed that the land was bought for Kshs 2,600,000/-.

5. The trial court in its judgment found that the Appellant failed to prove his case to the required standard and therefore dismissed the suit. Dissatisfied with the judgment the Appellant filed an application before the trial court to vary, review and/or set aside its judgment on three grounds; First, that the court did not take into account the issues of fraud itemized in the plaint at paragraph 10. Secondly, that the court failed to scrutinize the documents presented by the Appellant and thirdly, that the Appellant had discovered new evidence which was not within his reach at the time of prosecuting the matter. The Appellant argued that the application was made without any reasonable delay. The

trial court in dismissing the application held as follows;

“The matters raised by the applicant are issues to be considered by the appellate court as this court cannot sit on its on appeal. The orders being sought by the appellant are therefore orders that cannot be granted. I find that the applicant’s application to be incompetent, lacking merit and a clear abuse of court process.”

6. Aggrieved by the findings of the trial court the Appellant has filled this instant appeal raising the following grounds;

- 1) THAT the Learned Trial Magistrate erred in Law and fact by dismissing the Appellant’s application dated 3rd July 2017.
- 2) THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the provisions of Order 45 Rule 1, 2 & 3(2) of the Civil Procedure Rules.
- 3) THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the fact that there emerged new evidence and an error apparent on the face of the record.
- 4) THAT the Learned Trial Magistrate erred in law and fact by holding that the application dated 3rd July 2017 was not merited and therefore the court had become fuctus non official (sic).
- 5) THAT the learned Trial Magistrate erred in law and fact by failing to appreciate the submissions and the grounds of review.
- 6) THAT the learned Trial magistrate erred in law and fact by failing to uphold the judicial authority in exercising her discretion.
- 7) THAT the Learned Trial Magistrate erred in law and fact by relying on extraneous finding and ignoring submissions of the appellant.
- 8) THAT the Trial Magistrate failed to apply his judicial mind appropriately.

7. The appeal was disposed of by way of written submissions and a brief highlight of the submissions. The Appellant argued that as an innocent purchaser for value he did not realize that the documents presented to him were fraudulently obtained. He advanced that Jeremiah Masese was registered proprietor since 1974 and that there was no transfer to the respondent and it could only be inferred that the documents held by the Respondent were fraudulent. It was submitted that at the time the suit was instituted the information pertaining to the caution lodged by **Industrial and Commercial Development Corporation** (‘ICDC’) and the letter by the Land Registrar pertaining to the suit property were not within the appellant’s knowledge. Upon filing his application for review the Appellant availed the Certificate of official search and letter by the Land Registrar which demonstrated that the title documents held by the respondent and transferred to the respondent were not genuine.

8. The Respondent submitted that the Appellant had raised issues that were suitable for an appeal and not review. He further pointed out that although one of the grounds by the Appellant was that he had discovered new evidence which was not within its reach at the time the suit was heard, the Appellant failed to elaborate and state what the new evidence was. He also argued that the appellant was at all times aware of the documents and could not claim that they were not within his reach.

ISSUE FOR DETERMINATION

9. Having considered the Grounds of Appeal and the submissions by parties, the key issue for determination is whether the Appellant established a case for review of the lower court’s judgment.

ANALYSIS AND DETERMINATION

10. The principles that guide the court in an application for review of a decree or order are well established 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** which provides *inter alia*:-

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.**

Order 45 rule 1 of the Civil Procure Rules 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.

11. The first ground for review by the Appellant was that there was an error apparent on the face of the record as the judgment did not take into account the issues of fraud itemized in the appellant's plaint at paragraph 10. A simple scrutiny of the judgment of the trial court reveals that it considered the alleged fraud pleaded in the plaint. The trial court in its judgment held that;

“...simply raising issues of fraud in the plaint is not enough, the plaintiff ought to have established facts in proof of his case.”

The argument that the trial court erred in not recognizing that the Appellant had pleaded fraud at paragraph 10 of his plaint therefore fails.

12. The Appellant's application for review was also on the ground that the appellant had discovered that the title purportedly registered in his name was opened on 27th July 1974 and registered as entry No. 9. The title in favour of the Appellant was not new and **important evidence. The Appellant in his testimony at the hearing before the trial court testified that the suit property was transferred to him and a title deed was issued to him. Similarly, the Appellant had testified that he conducted a search which revealed that Jeremiah Masese was the registered proprietor of the suit property. In his application for review he claims that the caution lodged by Industrial ICDC was new and important evidence warranting an order of review. However, the certificate of official search relied on is dated 12th May 2015 and was obtained before institution of the suit and cannot be considered as new and important evidence.**

13. **Having considered the application for review and the supporting affidavit sworn by the Appellant, it appears that the Appellant intended for the trial court to re-scrutinize the document before it, with the hope that it would arrive at a different finding. It is evident that the trial court in arriving at its determination was aware that the property had been registered in the Appellant's name and the Appellant had been issued with a title. The appellant found out years later upon conducting an official search that the suit property was registered in the name of Jeremiah Masese. I am therefore constrained to agree with the trial court that it could not re-appraise the evidence afresh as the issues raised ought to have been presented to an appellate court.** The court of appeal in **George M Muhoro v Mwalimu Investment Company & another [2020] Eklr** held that the power of review is a very restricted power and is not to be confused with appellate powers which may enable an appellate Court to correct all manner of errors committed by the superior Court. This was also echoed by the Court of Appeal in **CSL v CASN [2020] eKLR** when it held that;

“Indeed, a review ought not to be done in a manner that can be construed as an appeal in disguise whereby an erroneous decision is determined afresh and fundamentally altered. It can only lie if one of the grounds as set out above is demonstrated. The purpose is not to enable a Judge rewrite a judgment or ruling because the initial one is erroneous but rather to address a new and important matter, address a mistake on the record or where established, any other sufficient reason.”

14. The appellant further claimed that he had obtained a letter from the Land Registrar which was to the effect that the records pertaining to the suit property could not be traced at the registry to ascertain the registered owner of the property. In the said letter the Land Registrar requests the Criminal Investigation Department to commence investigations to determine how the property was sold to different people who are claiming ownership. However, the confusion at the Land Registry was a matter known to the appellant and was part of the reason why he instituted the suit. In any case, the letter can only be admitted as new and important **evidence upon the appellant demonstrating that he exercised due diligence** but still failed to obtain the evidence. Had the Appellant wished to have the Land Registrar give evidence pertaining to the registration status of the suit property, he ought to have applied for summons to be issued to the Land Registrar so that he could give evidence in court.

15. The Appellant has failed to establish the grounds for review set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. I therefore find no reason to interfere with the findings of trial court. The upshot is that the appeal lacks merit and I dismiss it with costs to the Respondent.

Dated, signed and delivered electronically via zoom this 23rd day of April, 2020.

J.M. ONYANGO

JUDGE