



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO 17 OF 2013

GODFREY WANJALA WAFULA 1ST PLAINTIFF/APPLICANT

KOLOLI WAFULA NASIOMBE 2ND PLAINTIFF/APPLICANT

VERSUS

JAIRUS WAKHUNGU MULUNDA DEFENDANT/RESPONDENT

RULING

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 orders thereon as it thinks fit.”

The procedural law is found in **Order 45 Rule 1 of the Civil Procedure Rules** which states: -

“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.”
Emphasis added.

It is clear from the above that a party seeking a review of a decree or order must satisfy certain requirements which I have emphasized above. However, for purposes of this ruling, the Notice of Motion dated 31st January 2020 and filed by the Applicants herein on 3rd February 2020 will largely be determined on the basis of two of those requirements. These are: -

- 1. Whether or not an appeal was filed from the Judgment by MUKUNYA J dated 28th March 2018, and;**
- 2. Whether the said Notice of Motion was filed without unreasonable delay.**

A brief background to the dispute herein is useful to place the application at hand in proper context.

By an Originating Summons dated 28th February 2005 and filed by **GODFREY WANJALA WAFULA** and **KOLOLI WAFULA NASIOMBE** (the 1st and 2nd Applicants respectively), they sought orders that they are entitled to be registered as proprietors of the land parcel **NO KIMILILI/KIBINGEI/216** (the suit land) by way of adverse possession in place of **JAIRUS WAKHUNGU MULUNDA** (the Respondent herein).

In response to the Originating Summons, the Respondent filed a replying affidavit describing it, inter alia, as incompetent and bad in law, that the Applicants have no locus standi to file the suit and that in fact the 12 years limitation period had not lapsed to entitle the Applicants to orders in adverse possession. Most importantly, and which is relevant for purposes of this ruling, the Respondent counter – claimed in paragraph 18 of the replying affidavit for orders that the Applicants be evicted from the suit land.

It is clear from the record and also the Judgment of **MUKUNYA J** that on 23rd February 2016, **MR JUMA** counsel for the Applicants informed the Court that the Applicants had withdrawn their claim against the Respondent. That withdrawal was accepted subject to costs and the Judge directed that the Respondent's Counter – Claim be prosecuted. The Respondent duly prosecuted his Counter – Claim and by the Judgment dated 28th March 2018, the Applicants were ordered to vacate the suit land or be evicted therefrom by the Court Broker with help from the nearest Police Station. A decree followed.

The record shows that on 5th April 2018, the Applicants filed a Notice of Appeal. They then filed at the **COURT OF APPEAL AT KISUMU** Civil Appeal No 51 of 2018. It is common ground that as at the time of filing the application subject of this ruling, that appeal was yet to be determined.

I now have before me for determination, the Applicant's Notice of Motion dated 31st January 2020 premised under the provisions of **Sections 80, 3 and 3A of the Civil Procedure Act** and **Order 45 Rules 1 and 2 of the civil Procedure Rules** seeking the following orders: -

- 1. That the Honourable Court be pleased to review and set aside its Judgment delivered on 28th March 2018.**
- 2. That upon the Court herein setting aside the Judgment herein, the Court be pleased to set down the suit for hearing afresh.**
- 3. That costs of this application be provided for.**

I should at this stage point out that the Applicants were previously represented by **MR PAUL JUMA ADVOCATE** who however filed a Notice of Cessation to act for them on 11th May 2018. Thereafter, on 11th June 2019, **MR J. S. KHAKULA ADVOCATE** filed a Notice of Appointment of Advocate but on 3rd February 2020, the Applicants filed a Notice of Intention to Act in Person and it was in that capacity that they filed the application subject of this ruling. However, on 10th March 2020, long after directions had been taken that the application be canvassed by way of written submissions, the firm of **ELUNG'ATA & COMPANY ADVOCATES** filed a Notice of Appointment to act for the Applicants. Strangely, notwithstanding that appointment of advocate, the submissions were drawn and filed by the Applicants themselves! I don't know if all this muddle has contributed to the quagmire in which, as will be clear shortly, the Applicants now find themselves.

Back to the Applicants' Notice of Motion. It is based on the grounds set out therein and is also supported by the affidavit of **GODFREY WANJALA WAFULA** the 1st Applicant herein. Again, I must point out that both in the body of the application and the fifty-five (55) paragraph supporting affidavit, it is obvious that the Applicants are in fact canvassing an appeal in the guise of an application for review. For instance, in paragraphs 4, 5, 6, 7, 8 and 9 they refer to the suit land being ancestral land and make several references to the entries in the Green Card. In paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 they allege that their grandfather **ABRAHAM MULUNDA** never voluntarily transferred the suit land to the Respondents on 11th November 1980 and that the alleged transfer was fraudulent and was investigated by the Office of the Director of Criminal Investigations (**DCIO**), that the Respondent was charged at **KIMILILI SRM COURT** in Case No. 588 of 2019 (paragraph 31), that the Judgment herein was issued in error and without consideration of the real issues (paragraph 35) etc, etc.

The application is opposed and by his replying affidavit dated 22nd February 2020, the Respondent has deponed, inter alia, that the application is incompetent bad in law and is for striking out for reasons that following the Judgment dated 28th March 2018, the Applicants filed appeal No. 51 of 2018 which is pending. Therefore, since the Applicants have exercised their right of appeal, they cannot seek a review of the Judgment herein.

The application has been canvassed by way of written submissions which have been filed by the Applicants in person and by the firm of **KIARIE & COMPANY ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and the submissions.

It is conceded by the Applicants and confirmed by the Respondent that there is pending at the **COURT OF APPEAL KISUMU**, Civil Appeal No. 51 of 2018 arising out of the Judgment delivered herein on 28th March 2018. In their submissions, the Applicants have stated as follows at page 6: -

“My Lord, the most honourable thing we shall do at some point in time is to withdraw that appeal pending in the Court of Appeal altogether but that excuse should not be used by the defendant/Respondent to deny us audience before this Honourable Court.”

In paragraphs 6 and 8 of his replying affidavit, the Respondent has deponed as follows: -

6 “That the Applicants subsequently filed an appeal in the Court of Appeal vide KISUMU COURT OF APPEAL Civil Appeal No 51 of 2018. Annexed hereto marked JWM2 is a photocopy of the front page of the record of appeal.”

8 *“That the appeal No 51 of 2018 is yet to be heard and determined.”*

It is clear from the provisions of **Order 45 Rule 1(a) of the Civil Procedure Rules** that the remedy of review is only available where **“no appeal has been preferred.”** The Applicants having filed Court of Appeal Civil Appeal No 51 of 2018 arising out of the Judgment dated 28th March 2018, they automatically removed themselves from the ambit of **Order 45 Rule 1 of the Civil Procedure Rules**. In a recent Judgment delivered on 22nd May 2020 in **MULTICHOICE (KENYA) LTD .V. WANANCHI GROUP (KENYA) LTD & OTHERS 2020 eKLR, OUKO (P)** with whom the four other Judges (**MAKHANDIA, KIAGE, GATEMBU and SICHALE JJ.A**) agreed, held as follows: -

“In concluding this limb of the Judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom Judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the Court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different Courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the Court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

Therefore, for as long as **KISUMU COURT OF APPEAL** Civil Appeal case No 51 of 2018 is still pending determination by that Court, the remedy of review is not available to the Applicants.

Secondly, an application for review must be filed without unreasonable delay. The Judgment sought to be reviewed was delivered on 28th March 2018. This application was filed on 31st January 2020 almost 2 years later. That delay is not only unreasonable but has also not been explained. In **JOHN AGINA .V. ABDULSWAMAD SHARIF ALWI 1992 LLR 5734 (CAK)**, the Court stated thus: -

“An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy from any Court.”

Courts have found even lesser periods to amount to un – reasonable delay. In **HUSSEIN GULAKHAN & OTHERS .V. MARKET MANSION 2018 eKLR, YANO J** found an un – explained delay of 6 months to be unreasonable. In **TOBIAS OCHIENG ODHIAMBO .V. MARTIN MARAJI OBARE 2019 eKLR, KIBUNJA J** found an un – explained delay of 11 months to be un – reasonable and in **TERESIA MABUTI NJAGARA.V. NJAGARA NGURE 2016 eKLR**, I held that a delay of 11 months was unreasonable. The need to approach the Court for the remedy of review without un – reasonable delay was emphasized by the Court of Appeal in the case of **FRANCIS ORIGO & ANOTHER .V. JACOB KIMALI MUNGALA C.A CIVIL APPEAL NO 149 OF 2001** in the following terms: -

“In an application for review, an Applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the Applicant must make the application for review without unreasonable delay.” Emphasis added.

The delay of 2 years is unreasonable and disentitles the Applicants to the remedy of review under **Order 45 Rule 1 of the Civil Procedure Rules**.

It is clear therefore that on the twin issues of the pendency of **COURT OF APPEAL KISUMU** Civil Appeal No 51 of 2018 and also the unreasonable delay of 2 years, this application is really for dismissal. But that is not the only hurdle which the Applicants were unable to surmount. A perusal of the affidavit of **GODFREY WANJALA WAFULA** is replete with information which cannot be described as new and important matter or evidence which, after due diligence, was not within their knowledge or could not be produced. There is a reference to entries in the Green Card to the suit land evidencing fraudulent transactions involving the Respondent for which he was charged in **KIMILILI COURT** following investigations. The Applicants also allege in paragraph 49 of the said affidavit that their advocate was not **“diligent”** in the manner in which he handled their case and his error should not be visited on them. That is not the error envisaged in **Order 45 Rule 1 of the Civil Procedure Rules**. In paragraph 35 of the same affidavit, it is averred as follows: -

“That it is manifestly clear that the said Judgment was issued in error and without a consideration of the real issues.”

As is now clear from the record, the Applicant withdrew their suit against the Respondent who proceeded to formally prove his Counter – Claim which was not opposed. It is also instructive to note that the Applicants’ counsel **MR JUMA** was present in Court when the Respondent prosecuted his Counter – Claim and even cross – examined him. Under those circumstances, what other **“real issues”** was the trial Judge supposed to consider other than those placed before him by the Respondent? No appeal was filed against the ruling dated 1st March 2018 in which the Judge dismissed the Applicants’ motion to reinstate the withdrawn suit. If the trial Judge misconstrued the law or evidence, that cannot be a ground for review. That can only be canvassed on appeal – **NATIONAL BANK OF KENYA LTD .V. NDUNGU NJAU C.A CIVIL APPEAL NO 211 OF 1996 [1996 KLR 469]**. See also **PANCRAS T. SWAI .V. KENYA BREWERIES LTD C.A CIVIL APPEAL NO 275 OF 2010 [2014 eKLR]**. It must be obvious by now that the Applicants have reached a cul – de – sac and their only available option is to pursue their pending appeal.

On costs, the parties herein are related and although costs follow the event, I take the view that in order not to draw them further apart in this family dispute which has been raging in Court since it was first filed in 2005, the most prudent order to make is that each party bear their own costs.

The up – shot of the above is that the Applicants’ Notice of Motion dated 31st January 2020 is dismissed. Each party to meet their own costs.

Boaz N. Olao.

J U D G E

16TH July 2020.

Ruling dated, delivered and signed at **BUNGOMA** this 16th day of July 2020 by way of electronic mail with notice to the parties in view of the guidelines following the **COVID – 19** pandemic. And since the Applicants have been oscillating between acting in person and on other occasions acting through counsel, I hereby direct the Deputy Registrar to either transmit a copy of this ruling to the Applicants at their last known address or find other means of ensuring that they get this ruling even as it is emailed to their last counsel on record.

Boaz N. Olao.

J U D G E

16TH July 2020.