



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

APPEAL NO. 21 OF 2018

ANGELINA KALAMBA MWASI & 5 OTHERSAPPELLANTS

VERSUS

MBARUK AYUB ALI MBARUKRESPONDENT

And

APPEAL NO. 30 OF 2018

MICHAEL MURIITHIAPPELLANT

VERSUS

MBARUK AYUB ALI MBARUK..... RESPONDENT

RULING

(Application for review; applicant having succeeded in the Magistrate's Court on a suit for land but failing on appeal; applicant now wishing to have reviewed the judgment on appeal; appellant claiming that the court misinterpreted the evidence; that would be a ground for filing an appeal and not review; review cannot be used to have the court rehear the appeal; further ground for review being that the court wrongly consolidated two appeals; the consolidation being done by consent; no substance in the allegation; application dismissed with costs)

1. The application before me is that dated 20 May 2020 filed by the respondent to these two appeals. The application has been brought pursuant inter alia to the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010. In the application, the applicant is seeking an order for the review of the judgment of this court delivered on 6 May 2020. The application is opposed by the appellants.

2. To put matters into perspective, the applicant filed suit in the Mombasa Chief Magistrates Court, being Mombasa CMCC No. 121 of 2013. In that suit, he pleaded that on 19 October 2011, he entered into an agreement with the appellants in Appeal No. 21 of 2018 (whom I will refer to as the 1st – 6th appellants for ease of reference) to purchase a house without land on the Plot No. 211/II/MN at a consideration of KShs. 1,400,000/= . He filed suit after the appellant in Appeal No. 30 of 2018 (whom for ease of reference I will refer to as the 7th appellant) took possession of the land and started developing it. The position of the 1st – 6th appellant was that they did indeed enter into an agreement with the applicant, but the applicant failed to make payment as agreed. They then sold the property to the 7th appellant. After hearing the case, the learned trial Magistrate upheld the sale agreement between the applicant and the 1st – 6th appellants. Principally, she held that the sale agreement dated 19 October 2011 between the applicant and the 1st – 6th appellants, had a clause which provided that the full purchase price had been paid, and therefore the 1st – 6th appellants could not walk away from that. She thus found that it was the applicant who was entitled to the disputed property. Aggrieved, the appellants filed the subject appeals which were consolidated for hearing.

3. I heard the appeals and delivered judgment on 6 May 2020. I found that for the applicant to succeed he had to demonstrate that he had a valid and binding agreement for sale of the house with the 1st – 6th appellants; that the 1st – 6th appellants had capacity to sell; and that the consideration for the sale was fully paid according to the terms of the agreement. On the first issue, I found that the house was owned by the 1st – 6th appellants, but only 5 of them had executed the sale agreement. I found that this being the case, the sale agreement could not bind the person who had not executed it. On the settlement of the consideration, I found that the evidence was overwhelming that despite the sale agreement noting that full payment had been made at the time of executing the sale agreement, the fact of the matter is that full payment was not made. After evaluating the evidence, I found that of the consideration of KShs. 1,400,000/= the applicant paid an amount of KShs. 450,000/= to the 2nd appellant. The balance, KShs. 950,000/=, was to be paid to the 1st, 3rd – 6th appellants. The evidence showed that of

this balance of KShs. 950,000/=, only a sum of KShs. 170,000/= was paid. I further found that the 1st – 6th appellants would have been comfortable if a house had been built for them to cover the sum of KShs. 450,000/= of the purchase price and the rest (KShs.500,000/=) be paid in cash. Despite this, no house was built for them by the applicant and the balance of the money never paid. My finding was that the applicant failed to settle the agreed consideration and he could not therefore purport to have abided by the sale agreement. I held that the 1st – 6th appellants were entitled to rescind the agreement and sell the house to the 7th appellant. I upheld the appeal and substituted the judgment of the trial Magistrate with a judgment in favour of the sale to the 7th appellant. I however directed the 1st – 6th appellants to refund the applicant the money that he had paid. I also ordered the applicant to pay the costs of the case before the Magistrate’s Court and the cost of the appeal.

4. In this application, the applicant wishes to have the judgment reviewed. The application is based on the grounds inter alia that this court issued a judgment in respect to two matters despite the fact that the matters were never consolidated; that the Court failed to appreciate that the building of a new house was an agreement restricted to the 1st – 6th appellant and the 7th appellant, and ought not to have affected the agreement between the 1st -6th appellants and the applicant; that the court failed to appreciate that the parties willingly and jointly amended the terms of the agreement by their conduct when they opted to receive the full purchase price in instalments; that this Court attempted to rewrite the terms of the agreement between the 1st – 6th appellants and the applicant, contrary to the dictates of the law of contract; that this court is duty bound to rectify the error on the face of the record, to wit, the interpretation of the agreement between the 1st – 6th appellants and the applicant both the express and implied terms. The application is supported by the affidavit of the applicant who has more or less repeated the foregoing.

5. I have seen Grounds of Opposition filed by counsel for the 7th respondent to oppose the motion. It is inter alia averred that the issues raised in the application are not sufficient to warrant a review and that this court cannot revisit its judgment on merits as it is now *functus officio*.

6. In their submissions, M/s A.A Mazrui & Company Advocates, for the applicant, inter alia submitted that there was an error apparent on the face of the record in the manner in which the court interpreted the evidence and that the court proceeded to rewrite the contract of the parties.

7. In their written submissions, M/s Muthee Soni & Company, for the 1st – 6th appellants, inter alia submitted that this application is an abuse of the court process and attempts to reopen the appeal through the back door. It was submitted that the court is *functus officio*. It was further submitted that errors of law or fact, or the merits or demerits of the determination, are outside the purview of review. On the consolidation of the appeals, it was submitted that this was by consent.

8. For the 7th appellant, M/s Muturi Gakuo & Kibara Advocates, reiterated that this court is *functus officio*. It was submitted that the principles for review have not been met and that the applicant ought to have filed an appeal.

9. I have considered the application. This is an application for review, and applications of this nature, are governed by the provisions of Order 45 of the Civil Procedure Rules. Order 45 Rule 1 provides as follows :-

Application for review of decree or order

(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.

10. It will be seen from the above that a party may apply for review where :-

(a) there is 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 the decree was passed or the order made;

(b) there is some mistake or error apparent on the face of the record;

(c) for any other sufficient reason.

11. From the application before me, there is no allegation of any discovery of new and important matter or evidence, and the applicant indeed does not wish to introduce any new evidence or matter. My understanding of the application is that it is based on the ground of “mistake or error apparent on the face of the record.” The mistake or error that the applicant points out is that the court erred in writing a consolidated

judgment when there were two appeals; that the court rewrote the contract between the parties ; that the court failed to appreciate that the agreement to build the house was that between the appellants; that the court failed to appreciate that the parties modified the terms of contract by their conduct so that payment could be by instalments, and that the court misapprehended the evidence.

12. With respect, apart from the claim that the court wrongfully consolidated the two appeals, the rest of the grounds, in my view, do not constitute errors or mistakes apparent on the face of the record. These are concrete findings of the court when it exercised its appellate jurisdiction. Where one is aggrieved by a substantive finding of the court, the avenue is to file an appeal and not to seek a review, for the court has no jurisdiction to rehear the appeal all over again. A review cannot be used as a substitute for an appeal. An error apparent on the face of the record is not one that would be the subject for arguments and is one that would be clearly apparent, say, a wrong description of the property in issue. But if one is aggrieved by the substantive findings of a court, or the manner in which the court appreciated the evidence, and nothing stark can be pointed out as constituting an error, then the avenue for one would be an appeal. This to me is the avenue that the applicant ought to have taken. If I proceed to entertain this application, then in essence, I will be rehearing the appeal, of which I do not have jurisdiction to do.

13. On the complaint that the appeals were consolidated, the consolidation was by consent of all parties, which consent was entered into on 25 September 2019, when directions on the hearing of the appeal were taken. Indeed the following was the consent of the parties :-

“By consent :-

(i) All pending applications be abandoned.

(ii) Appeal No. 30 of 2018 be consolidated with Appeal No 21 of 2018.

(iii) Appeal No. 30 of 2018 be the lead file for purposes of proceeding with the appeal. ...”

14. The above consent speaks for itself and I wonder what the complaint of the applicant is. Even without the above consent, this court would still have consolidated the appeals, for they arose out of the same judgment, and there would be no point in writing two judgments. There is certainly no substance in the ground that the court fell in error in consolidating the appeals.

15. Given the above, it is clear that I find no merit in this application. It is hereby dismissed with costs.

16. Orders accordingly.

DATED AND DELIVERED THIS 24TH DAY OF SEPTEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA