



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 48 OF 2012

1. DISHON MAREKO
NGINE)
2. NYAGA
BURANA.....)
3. NDAMAN IRERI
SIGANA.....) APPLICANTS
4. EZEKIEL
NDARA)
5. GILBERT KIURA
MATHOROKO)

VERSUS

1. FAUSTION NJERU NJOKA)
RESPONDENTS
2. FRANCIS NJERU NYAGA)

RULING

This is in respect to the applicant's Notice of Motion dated 16th November 2004 and filed herein on 15th December 2004 seeking the substantive prayer that the judgment/decreed dated 10th November 1999 be reviewed and or set aside. The same is supported by the affidavit of FRANCIS NJERU MBAKA and based on the ground that there is an error on the face of the record. The application is opposed and in a replying affidavit by FRANCIS NJERU NJOKA the 1st respondent herein, it is deponed, inter alia, that the allegation of error on the face of the record is far from the truth since this matter was the subject of two appeals which were consolidated and determined by the Court of Appeal on 5th November 2004 and therefore this application is bad in law.

The application was canvassed by way of written submissions filed by Mr. E.K. Mutua Advocate for the applicants and Mr. D. Muyodi Advocate for the 1st respondent. On 29th October 2013, both Mr. Wandati for the applicants and Mr. Muyodi for the respondents appeared before me for purposes of highlighting their respective submissions.

I have considered the application and the rival affidavits together with the written and oral submissions by counsels

This application, as I have stated above, seeks the review of the judgment and decree of Justice Etyang (as he then was) dated 10th November 1999 and delivered on 17th December 1999. The same was founded under the then **Order XLIV Rule 1 of the Civil Procedure Rules** (now Order 45 Rule 1) and **Section 3A Civil Procedure Act. Order 45 Rule 1 (1) of the Civil Procedure Rules** provides as follows:-

“ 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 review of judgment to the Court which passed the decree or made the order without unreasonable delay”***

It is clear from the above that once a party has filed an appeal, the remedy of review is no longer available. In **KISUA INVESTMENT LTD VS ATTORNEY GENERAL & L.R ODUPOY Civil APPEAL NO. 31 of 1995**, the Court of Appeal stated as follows:-

“An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with ----- A review application is incompetent after the appeal is referred”

It is clear from the history of this litigation that following the judgment of Etyang J (as he then was) in High Court Civil Appeal No. 52 of 1996 (which had been consolidated with High Court Civil Appeal No. 19 of 1997), an Appeal was filed in the Court of Appeal being Court of Appeal Civil Appeal No. 42 of 2001 which was struck out on 5th November 2004. The issue being raised in this application is that there was an error on the face of the record in that High Court Civil Appeal No. 19 of 1997 and No. 52 of 1996 should not have been consolidated by Justice Etyang (as he then was). Unfortunately, once an appeal was preferred against that judgment in the Court of Appeal which went on to deliver a judgment, the applicants herein could no longer return to the High Court for review because **Order 45 Rule 1 (1) (a) of the Civil Procedure Rules** says so.

Once an appeal is preferred, the remedy of review is spent and is no longer available to the party.

Secondly, **Order 45 Rule 1(b)** requires that an application for review be brought “ ***without unreasonable delay***”. The judgment sought to be reviewed was delivered on 17th December 1999 and this application for review was filed on 15th December 2004 i.e. five (5) years later. That, in my view, was in-ordinate delay which has not even been explained and which therefore militates against their applicants.

This application can only be for dismissal and it is hereby dismissed with costs.

B.N. OLAO

JUDGE

12TH FEBRUARY, 2014

12/2/2014

Coram

B.N. Olao – Judge

CC - Mwangi

Mr. Mutua for Applicant absent

Mr. Abubaka for Okwaro for Respondent present

COURT: Ruling delivered this 12th day of February 2014 in open Court

Mr. Mutua for applicant absent

Mr. Abubaka for Mr. Okwaro for respondent present

B.N. OLAO

JUDGE

12TH FEBRUARY, 2014