REPUBLIC OF KENYA AT KISII

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 313 OF 2006

GEKARAAYIOKA……APPELLANT

VERSUS

SEPHEN NYAMOKO NYANGENA……..RESPONDENT

RULING

1. The genesis of this matter is that the Appellant/Respondent is and was the registered owner of land parcel No. East Kitutu/Botamori III/193 which he bought the same from the father of the Respondent/Applicant –Nyangena Machora and had title to the same. By a letter dated 31st March, 2003 from M/s Nyamai & Co. Advocates addressed to the appellant amongst others and copied to the officer commanding police division and written in the instructions of the respondent amongst others, the respondent /applicant accused the appellant/respondent of trespassing in their land and surveying the same without their consent and knowledge the respondent/applicant demanded that the illegal survey in favour of the appellant /respondent be nullified. By a copy of the said letter they requested the OCPD Nyamira police Division to investigate the trespass and illegal survey if possible and prefer criminal charges against those involved. Subsequently, when the OCPD received the said letter he instructed his officers to investigate the complaint which led to the summoning of the appellant to the police station as a suspect.
2. After investigations police decided not to charge the appellant/respondent but instead the respondent/applicant in Nyamira Senior Resident magistrate's court in criminal case no. 368 of 2006 for the offence of trespass with intention to annoy contrary to section 5(1)(c) of trespass Act. Consequently, the said proceedings were terminated in favour of the respondent/applicant as he was acquitted under section 210 of the Criminal Procedure Code.
3. Soon after the acquittal the respondent/applicant sued the appellant/respondent claiming general damages for malicious prosecution. After evaluating the evidence of both the respondent/applicant and appellant/respondent the learned magistrate awarded kshs. 150,000 as general damages to the respondent/applicant as against the appellant/respondent and the Attorney General.
4. The appellant/respondent aggrieved by the above judgment and decree appealed in the High Court in Civil Appeal No. 513 of 2006 before Makhandia, J (as he was then) and in turn Makhandia J after considering the Appeal held as follows:

"To begin with, there was no evidence whatsoever that the appellant instituted the proceedings and that the police who filed the criminal charge against him were 'a people for whose acts he was responsible indeed the matter was commenced by the respondent himself vide the letter to the appellant and which he copied to the OCPD. The appellant was summoned and he presented his side of the story and it is the police who upon conducting their investigations and without the appellants direction, influence or control, decided to charge the respondent with the offence instead. There was no evidence that the appellant influenced the police in their investigations and or he acted in collusion or cohorts with them. It is the police in their wisdom or/lack of it who preferred the charge against the respondent after I would

imagine having interrogated the appellant as well as the respondent…..”

…………*The particulars of matter alleged by the respondent are that the appellant presented information to the police that he knew to be false or untrue, causing the arrest of the respondent without any reasonable cause, framing accusations against the respondent that were found to be false by a court of competent jurisdiction and testifying or procuring false testimony against the respondent by a false charge. None of these allegations of malice were alluded to by the respondent both in testimony in chief, cross examination and even in re-examination. Accordingly the learned trial magistrate erred in law and in fact in concluding that malice was proved on the basis that appellant was driven by malice when he lodged with the police of a complaint against the respondent when he knew that boundaries had not been determined.*

…………*...find that the prosecution of the respondent was not instituted by the appellant or someone for whose act, or omission he was responsible though the prosecution terminated in the respondent's favour, it was activated by malice. Indeed the prosecution it would appear was instituted with reasonable and probable cause and that none of the particulars of malice as set out in the plaint were proved'.*

5. In the end the appeal was allowed, the judgment and decree of the lower court was set aside, and substituted thereof with an order dismissing the suit with costs. The appellant also was awarded costs of the appeal too.
6. The above judgment of the High court has now triggered the present application by the advocate representing the respondent/applicant herein Benard Oyugi Ombui. In his Notice of Motion filed under order XLIV rule 1 and Order L. Rule 1 of the Civil Procedure rules dated 17th August, 210 he seeked the following orders:

a. *THAT this Honourable court be pleased to review its judgment dated 16th July, 2010.*

b. *THAT the costs of the application be provided for.*

7. The above application was supported by an affidavit contending that there appears to be an error apparent on the face of the record in that the background information is at variance with the proceedings and finding of the lower court as per the Record of Appeal, the finding that the respondent failed to file written submissions is not true because the delay by the respondent to file the submissions was caused by failure by the appellant counsel to serve in time to enable them make reply, that it is clear from the lower court proceedings, the supplementary Record of Appeal page 5 that it is the appellant who commenced the Criminal Proceedings and not the respondent and lastly that the judgment in the lower court was entered against both parties jointly and severally and it is only the appellant who preferred this appeal.
8. In a swift rejoinder by the appellant/respondent's counsel, J.O. Soire filed a replying affidavit dated 22nd July, 2013 denying that the written submissions drawn by his office were served in the respondent's counsel on 21st June, 2010 as the same were dispatched by an undercover letter dated 1st June, 2010 and subsequently posted by Expedite mail service on 2nd June, 2010. That there is no error apparent on the record to warrant a review of the judgment dated 16th July, 2012, that if findings of the Honourable judge, are faulty or erroneous perse cannot be a ground for review but rather for filing an appeal and lastly in his own opinion he contended that the holdings of the judge were proper, well and that this application is thus unmerited and should be dismissed.
9. Order 45 for review, sets out the grounds which such an application should be predicated upon. Rule (c) of the orders reads:

“(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 and not be produced by him at the time when that decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, of for any other sufficient reason***, desires to obtain a review of the decree, or order may apply for a review of the decree, or order may apply for a review of judgment to the court which passed the decree it made the order without unreasonable delay'.

10. The parameters from which such an application for review are to be set out as stated above are that there should be discovery of new and important evidence, an error apparent on the face of the record any other sufficient reason.
11. Also the ruling in Francis Origo & another v. Jacob Kumali Munagala(2005) eKLR, is applicable in this case where the court of Appeal held:-

*'From the foregoing, it is clear that an applicant has to 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 another sufficient reason……Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal***.** *(emphasis added). Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction'*.

12. In the instant application, I believe that the applicant/respondent has proceeded in the wrong direction. In view of his supporting affidavit that the judge did not consider their written submissions in writing his judgment and the fact that the judge also stated that it was the respondent who complained to the police while he contends that it was infact the appellant relying on the above ruling in Francis Oligo(supra) it would seem that he is infact challenging the judgment of Makhandia, J and an appeal would be the correct avenue to address his reservations on the said judgment as opposed to a review.
13. As a result of what I have stated above, I have no hesitation but to dismiss the application dated 7th September, 2013 with costs to the respondent/appellant.

Ruling dated and delivered at KISII this 4th day of December, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

No appearance for the appellant

Bosire for the respondent

Edwin Mongare Court Clerk.