



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT ELDORET

ELC APPEAL NO. 24 OF 2020

BARTERA MOIYO.....APPELLANT

VERSUS

CHRISTOPHER KUTO.....RESPONDENT

(Being an appeal from the entire ruling of the Principal Magistrate's court at Kapsabet (Hon. Atonga) delivered on 20th July, 2006 in PMCC No. 32 of 1989)

JUDGMENT

This appeal arises from the lower court's ruling dated 20th July 2006 delivered in Kapsabet in RMCC NO. 32 of 1989. The appellant herein being aggrieved by the said ruling lodged this appeal vide a memorandum of appeal filed on 26th July 2006 listing 14 grounds that:

1. The Learned Magistrate erred both in law and fact by finding with finality that no other Magistrate could consider an application for review of an order other than the Magistrate who made that order in the first instance notwithstanding that the Magistrate who made the order had long left the station and the Judiciary.
2. The Learned Magistrate erred in law and fact in finding that he could not decide the application because he was not the Magistrate who heard it before despite the fact that Hon Kinuthia who heard the application before was no longer in the station.
3. The Learned Magistrate erred in law and fact in failing to find that the provisions of order X LIV Rule 4 as introduced by LN No. 5 of 1996 expressly allowed him to hear an application for review where the officer who made the order was no longer attached to the court.
4. The Learned Magistrate erred both in fact and law when knowing that he was not the one who had made the order to be reviewed nevertheless went ahead to hear submissions by both parties and then failed to make any finding on the said submissions save that he could not consider the application not being the Magistrate who made the order.
5. The Learned Magistrate erred both in fact and law in failing to refer the matter to another court for hearing if indeed he was precluded from hearing the same on account of not being the Magistrate who made the order the subject of the review.
6. The Learned Magistrate erred in law and fact in finding that the Appellant's only remedy lay in an appeal to the High Court despite express evidence that the Appellant had not appealed and that therefore the law allowed him to apply for a review.
7. The Learned Magistrate erred in law and fact in failing to make a finding on any of the issues raised by the parties in their submissions and especially erred in finding that if there was an error apparent on the face of the record, he was not competent to hear the application not having been the Magistrate who heard it in the first instance.
8. The Learned Magistrate erred in law and fact in holding that the application of the appellant should have been brought by way of an appeal and that he would be sitting on the appeal if he decided the application.
9. That the learned Magistrate erred in law and fact in failing to find that the schedule from the Settlement Fund Officer and the Land Registrar, direct evidence to the effect that the Respondent was only entitled to 49 acres and not the 52 acres of land awarded to him did constitute an error apparent on the face of record.
10. That the Learned Magistrate erred in law and fact in failing to find that the schedule from the Settlement Funds Trustee clearly confirmed the respondents witnesses' account about the Respondent being awarded 49 acres of land and therefore that it was an error on the record for the Honourable Magistrate to have awarded 59 acres to the Respondent.

11. The learned Magistrate erred in law and fact in failing to find that having said the parties should go back to the boundaries of 1963 the natural consequence was that the Appellant's acreage was 72 acres and the Respondent's 29 acres and therefore that there had been an error apparent on the face of the record when the court granted the prayer awarding the Respondent an extra 10 acres.

12. That the Learned Magistrate erred in law and fact in finding that there had been an inordinate delay in bringing the application for review when that issue had not been and was not the subject for any submissions either by the respondent or the appellant.

13. That the learned Magistrate erred in law and in fact in holding that the application for review had been brought 'not in good faith based on the ground that Honourable Mr. Justice Aganyanya had dismissed an application Misc No. 32 of 1989 Eldoret despite the fact that Hon. Mr. Justice Aganyanya never presided over that case it being a subordinate court case that had been filed Kapsabet.

14. That the learned Magistrate erred in law and fact in finding that the lapse of 9 years was an abuse of the process of the court when in fact he had not even considered the merits of the case on the grounds that he was not competent to do so not being the magistrate who had heard it.

Counsel for the parties agreed to canvas the appeal vide by written submissions which were duly filed.

APPELLANT'S SUBMISSIONS

Counsel for the Appellant gave a brief background to the case and stated that the court delivered a judgment on 2nd February 1993 in Kapsabet RMCC No. 32 of 1989. That the Appellant being dissatisfied with the judgment filed the application dated 7th October 1998 seeking to review the judgement which application was dismissed through a ruling delivered on 20th July 2006 as at page 74-75 of the record of appeal.

Counsel condensed the grounds of appeal to five and submitted that the Magistrate erred in law and fact in finding that he had no legitimacy to hear and determine the application for review of the judgment. Counsel relied on Order XLIV Rule 4(1) which stipulates that:-

4(1) If the judge who passed the decree or made the order sought to be reviewed is no longer attached to the court, the application may be heard by any other judge who is attached to the court at the time the application comes for hearing.

Counsel submitted that the Learned Magistrate misconstrued the law by finding that only Hon. G. Kinuthia could hear the application for review and in the absence of the said Magistrate the only option was to appeal. Counsel further submitted that the Magistrate was empowered by law to hear and determine the application for review and cited the case of **Guardian Bank Limited Vs Jetha & Sons & 3 others [2004] eKLR**

On the second issue as to whether the Learned Magistrate should have pronounced himself on the application after finding he had no jurisdiction, counsel submitted that if the magistrate had no jurisdiction then the proceedings and the ruling were null and void and cited the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** on jurisdiction. That the Magistrate had the option of transferring the matter to be handled by another court which he never did.

On the issue as to whether the Appellant's remedy lay in review or appealing against the decision, counsel relied on Section 80 of the Civil Procedure Act which provides that:

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."

Further, that Order 45 Rule I (b) of the Civil Procedure Rules provides for instances when a party may apply for review which are:

a) Upon 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

b) On account of some mistake or error apparent on the face of the record

c) For any other sufficient reason.

Counsel therefore submitted that the learned Magistrate was wrong in finding that the Appellant's remedy lay in appeal since the Appellant was not challenging the legal soundness of the judgment but to correct an error which was apparent on the face of the record.

Ms. Lunani cited the case of **National Bank of Kenya Limited Vs Ndun'gu Njau [1979] eKLR** which sets out the distinction between cases suitable for appeal and review where the court stated that an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law or that he exercised his discretion wrongly in the case.

On the issue on whether there was an error apparent on the face of the record, counsel submitted that the judgment at page 35 provided that all subsequent amendments to the register were null and void and that the acreages of the parcels should be as they were in 1963 when the allottees got their respective parcels of land from the Settlement Fund Trustees. That the appellant was allotted 72 acres while the respondent had 49 acres hence counsel submitted that it was an error on the part of the Magistrate to find that the respondent was entitled to 49 acres and not 59 acres.

On the issue of inordinate delay in filing the application, counsel explained why there was delay in filing the application which reasons were due to the various advocates who represented the appellant. Counsel therefore urged the court to allow the appeal and vacate the orders in the ruling dated 20th July 2006 to allow the review of the judgment delivered in Kapsabet PMCC No. 32 of 1989

RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that the issue for determination was as to whether the appellant was entitled to an order for review. It was counsel's submission that an application for review must be filed without unreasonable delay.

Mr. Kamau submitted that even though the appellate court is mandated to review and reverse or otherwise the findings or verdict of the lower court, it must exercise its jurisdiction with caution. Counsel further submitted that as a general rule, an appellate court should not interfere with the findings or decision of a lower court unless it is demonstrated that in reaching its decision, the lower court made an error of law or took into account irrelevant considerations or that the court based its decision on no evidence or a misrepresentation of the evidence.

Counsel relied on the case of **Bank of Baroda Vs Margaret Njeri Muiruri (2004)eKLR** quoted the Supreme Court's decision in **Parliamentary Service Commission v Martin Nyaga Wambora & others 2018 eKLR** where it summarized the principles for an application for review as follows:-

- a) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
- b) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- c) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- d) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- e) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- f) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - (a) as a result a wrong decision was arrived at; or
 - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

In the case of **Parliamentary Service Commission v Martin Nyaga Wambora & others** (supra) the Supreme Court reiterated as follows: -

"We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case... at the core of the application is the Court's exercise of discretion. It is the Court/Judge's decision that is impugned and not the substantive application being re-argued. Hence an applicant is under a legal burden to lay a basis, to the satisfactory of this Court, that in exercise of its discretion, the limited Bench acted whimsically or misdirected itself in reaching the decision it made."

Counsel submitted that the learned Magistrate rightly held at page 74 of the Record of Appeal that the intention of the legislature was that litigation must always come to an end without unreasonable delay. That the decision of the court which gave rise to the application for review was passed on 2nd February, 1993 yet the application for review was filed on 7th October 1998 which is more than 5 years down the line.

Mr. Kamau submitted that the Appellant herein had filed High Court Miscellaneous Application Number 48/1993 seeking enlargement of time to appeal out of time which application was dismissed with costs. That the appellant did not appeal the decision of the High Court at the Court of appeal hence could not turn around and seek for review after five years.

Counsel finally submitted that where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order, he sought reviewed and urged the court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

The appellant filed 14 grounds of appeal which were repetitive but I find that there is only one issue for determination which is whether the Learned Trial Magistrate was right or wrong in rejecting an application for review. Order 45 Rule 1(a) and (b) in addition to setting out the conditions to be met in an application for review, reiterates the proviso of Section 80(a) and (b) which makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party.

In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court of Appeal stated as follows regarding the duty of first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

The court is cognizant of the fact that whenever it is called upon to interfere with the exercise of judicial discretion, it can be guided by the principles enunciated in the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others [2014] eKLR** where it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

From the record of appeal and the submissions by the appellant's counsel show that the appellant's application for review was not for the correction of an error on the face of the record as it was not self-evident. The application required elaborate arguments which would result in the Learned Magistrate reopening the case to establish facts hence sitting as an appeal court on his own judgment.

Upon the perusal of the arguments during the application, you would think that the case was being heard afresh where parties were giving new evidence. Counsel for the appellant submitted that the judgment at page 35 provided that all subsequent amendments to the register were null and void and that the acreages of the parcels should be as they were in 1963 when the allottees got their respective parcels of land from the Settlement Fund Trustees. That the appellant was allotted 72 acres while the respondent had 49 acres.

That kind of submission points to the fact that the applicant would like to have an opportunity to re-litigate and not a review of the judgment. It would be an abuse of court process for a court to review a judgment and take additional evidence which questions the validity or the legitimacy of the judgment.

The question that we need to answer is whether an error apparent on the face of the record include errors of law as was held in the case of **Nyamogo & Nyamogo vs. Kogo (2001) EA 174, where the Court of Appeal stated that:-**

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”

On the issue as to whether the trial Magistrate erred in finding that it was only Hon. G Kinuthia who could review the judgment, the procedure is clear that when a judge or a Magistrate has rendered a judgement, it is incumbent upon the said person to review it unless he or she is out of station, on transfer, no longer in service or deceased. On this limb I find that the Learned Trial Magistrate misconstrued the issue that only Hon. Kinuthia was the only person that could review the judgment. This finding does not give life to the appeal on review as what the applicant sought was a second bite to the cherry to reopen the case and come up with a different decision.

This would not have changed the position as regards principles of review as there was no error apparent on the face of the record. If the appellant was aggrieved by the decision, then he could have filed an appeal against the judgment that gave the appellant less acreage.

In **Chittaley & Rao in the Code of Civil Procedure (4th Edn) Vol. 3, pg 3227** explains the distinction between a review and an appeal in the following words: -

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”

The application also suffered from inordinate delay having been filed after 5 years from the date of the Judgment. The explanation given that the appellant changed advocates is not a sufficient reason to explain away the delay. The applicant also filed an application in the High court for extension of time to lodge an appeal out time which was dismissed with costs. Litigation must come to an end at some point.

I find that the appeal lacks merit and is therefore dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 25TH DAY OF NOVEMBER, 2020

M. A. ODENY

JUDGE