



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram:Law, Miller & Potter JJA)**

**CIVIL APPEAL NO 37 OF 1981**

**Between**

**KINGATA KITHOI .....APPELLANT**

**RICHARD KIMATU .....APPELLANT**

**AND**

**MBEVI KIOKO.....RESPONDENT**

**MAKAVA MUSYOKA.....RESPONDENT**

**JUDGMENT**

**Law JA** The respondents in this appeal were the plaintiffs in Civil Suit No L 44 of 1977 in the District Court at Uaani in Machakos District. The appellants were the defendants. The respondents claimed that the appellants had encroached on part of their land. The magistrate heard a number of witnesses and visited the disputed land. He satisfied himself that there had been no encroachment; that the boundaries between the land of the respondents and the appellants were established and marked by sisal hedges and that the respondents' claim was without merit. He gave judgment for the appellants.

The respondents appealed to the Resident Magistrate at Machakos who, after hearing argument from an advocate for the respondents and from the appellants in person, allowed the appeal on the ground that the District Magistrate had come to a wrong decision on the evidence.

The appellants then appealed to the High Court. This being a second appeal, it was final (Section 71A(2) of the Civil Procedure Act). On this occasion both parties were represented by advocates. The learned judge, after setting out in his judgment the arguments for both parties, made the following order:

- “1. The court considers that there is insufficient material before the court to justify it in upsetting the trial magistrate’s decision. The magistrate having seen and heard the witnesses made certain findings of fact, with which it would not be proper for the court to interfere.
2. The court accordingly allows the appeal with costs, as prayed in the Memorandum of Appeal.”

The effect of this judgment, read together with the Memorandum of Appeal, was that the appeal was allowed with costs, that the judgment of the Resident Magistrate was set aside and the judgment of the District Magistrate was restored, with costs in both courts below.

The respondents, having no further right of appeal, then applied to the same learned judge to review his

judgment, under Section 80 of the Civil Procedure Act, Order XLIV and Order L rule 1, the grounds for such application being stated in the affidavit in support of the application as being that there were mistakes or errors apparent on the face of the record, within the meaning of Order XLIV rule 1(1).

The learned judge entertained the application. He again set out the arguments of the advocates at length, and concluded:

“The lower court having heard the witnesses and had an opportunity of observing their demeanour in the witness box gave judgment for the defendants. It would, in the opinion of this court, be wrong for it to upset the judgment of the lower court, which amounted to a clear and unambiguous finding on the facts of the case. No question of law was involved in the appeal to this Court.”

From this it is apparent that the learned judge, at the end of the application for review, was of the same opinion as he had been in the appeal: the decision of the District Court Magistrate was correct and should be maintained. But he then went on to make orders which I find incomprehensible, in view of his holding set out above. He said:

“The court accordingly orders as follows-  
1. That its premises (previous?) judgment be and is hereby vacated.  
2. That this appeal be dismissed with costs to respondents”.

This is like a judge holding, in a civil case, that the plaintiff had proved his case, and then giving judgment for the defendants. I can only think that the learned judge in this case suffered from a temporary aberration, and instead of dismissing the application for review, he dismissed the appeal itself. It is not possible to find out from the judge himself what he meant, because he is no longer in Kenya. However, I do not think it matters, as in my view no mistake or error in his original judgment was apparent on the face of the record, so that the application for review should have been dismissed. The learned judge had allowed the appeal because, in his view, the District Magistrate’s decision was correct and it would not be proper to interfere with it, a view to which he adhered in his judgment on the review application. This was a reasonable view, and I can see no mistake or error apparent from the record of appeal which could justify any corrective action on review.

I would allow this appeal, with costs. I would set aside the confused, contradictory and incomprehensible orders made on the application for review, the subject of this appeal, and give the appellants the costs of that application. I would restore the orders made by the learned judge on the appeal before him, to the effect that that appeal be allowed, with costs; that the judgment of the District Magistrate be restored, and that of the Resident Magistrate set aside, with costs to the appellants of the proceedings in those courts. As Miller and Potter JJA agree, it is so ordered.

**Miller JA.** This appeal is from the ruling of Wilkinson-Guillemard J in High Court, Nairobi Civil Appeal No 46 of 1979 dated the July 8, 1979. The litigation between the two sets of parties was first dealt with in the District Magistrate’s Court at Tawa, thence by the Resident Magistrate’s Court, Machakos, on appeal and then on further appeal to the High Court. The appellants being dissatisfied with the judgment in the appellate proceedings in the High Court, applied for its review; and it is the ruling in the review proceedings which is the subject of the instant appeal on these grounds:

“1. That the ruling of the learned judge is bad in that it is contrary to law and in particular the law relating to review.

2. That the learned judge erred in failing to determine and/or consider whether the application before him fell within the provisions of Order XLIV of the Procedure Rules and Section 80 of the Civil Procedure Act and that he erred in failing to consider the merits or otherwise of the application.

3. That the learned judge erred in failing to determine the matter before him.”

In essence, the present appeal challenges the results of both the proceedings in the High Court.

Section 80 Civil Procedure Act provides:

“80. 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.”

The operation of Order XLIV in the execution of Section 80 above demands, *inter alia*, that an application for a review must be based on the discovery of new and important matter of evidence which after the exercise of due diligence, was not within the applicant's 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. The court to which the review application is made shall dismiss the application if satisfied that there is not sufficient of the aforesaid grounds for seeking review; except for mistake or error appearing on the face of the challenged record; and the applicant must strictly prove the grounds for review (excepting mistake or error on the record) failing which the application will not be granted.

The underlying contention of the present appellants, is that the learned judge by apparently dismissing the application for review of his appellate judgment and in the same breath vacating the said appellate judgment, he in effect restored the litigation as at the stage of the appeal to the Resident Magistrate's court thereby leaving no final determination of the litigation, to which both sets of the parties were entitled. There are therefore two points for decision ie (1) was the learned judge in error as a matter of prescribed procedure and (2) did he thereby fail to treat and determine the merits of the case? As to the first proposition it was not open to the appellants to proceed on appeal from the learned judge's first decision.

They had to seek review, as there was no right of appeal from the first High Court appellate judgment as per Section 71A(2) Civil Procedure Act.

It therefore becomes necessary for this court to look into the nature of the judgments and pronouncements of the courts from the inception of the litigation up to the ruling on the application for review of the High Court's appellate judgment.

The suit related to land and was commenced in the District Magistrate's Court in Uaani. The present respondents were there the plaintiffs and the appellants the defendants. The subject-matter of the suit usually stated in lay complaints was "Boundary and costs of the suit;" and this must be understood to mean the portion of land which would be declared the property of the plaintiffs if an acclaimed boundary by the defendants is found to be false or unjust; and that claimed by the plaintiffs upheld. The present respondents lost their claim in the District Magistrate's Court. Judgment; and the relevant pronouncements of that court were:

“Having then considered the evidence as a whole and from the old litigations over the land by the defendants' family with Kiminu Kitonga under Miu African Court Civil Suit 409 of 1951 and with Kisangau Maingi under Civil Suit L 22 of 1963, I find and believe that the boundary claimed and well maintained by the defendants is the true and correct boundary. And I find the plaintiffs' claim to have no merit.

And in conclusion I reject the boundary needed by the plaintiffs and accept the boundary claimed by the defendants marked in the sketch plan D-E-F-G”

The present respondents then appealed to the Resident Magistrate's Court at Machakos and the Resident Magistrate allowed the appeal with these pronouncements of judgment:

“Having considered all the evidence in the lower court and the submissions in appeal I am satisfied that the trial court had come to a wrong decision in granting the land lying within the letters D C A H G F E and D to the preference to the appellants’ rightful claim to it corroborated by independent witness. The appeal is thus allowed and judgment of the trial court between the above letters D C A H G F E and D is given to the appellants as lawfully belonging to them. The respondents shall pay the appellants costs of the appeal and of the lower court.”

There then followed the present appellant’s appeal to the High Court seeking to reverse the appellate decision of the Resident Magistrate and in my view, it is not this stage that much of the confusion attending and founding the application by way of review commenced. The High Court allowed the appeal and restored the judgment of the District court magistrate.

The application for the review of the High Court’s appellate judgment was made under section 80 of the Civil Procedure Act and Order XLIV of the Civil Procedure Rules the relevant portions of which, I have set out above. In particular and from the record of the proceedings as it then stood, the application had to be considered within this portion of Order XLIV rule 1 ie “on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.” In the affidavit in support of the application, it was averred inter alia:

“7. That I verily believe that the orders made by the Honourable judge are incomprehensible and ununderstandable.

8. That this is a fit and proper case for review as the judgment contains errors on the face of it.”

In his ruling on the application, the learned judge having reviewed the two lower courts’ judgments and his own, made the following conclusion:

“It would, in the opinion of this court, be wrong for it to upset the judgment of the lower court, which amounted to a clear and unambiguous finding on the facts of the case. No question of law was involved in the appeal to this court.

The court accordingly orders as follows: That its premises judgment be and is hereby vacated. That this appeal be dismissed with costs to Respondents”

I have deliberately entered upon the reproduction of the above salient portions of the ruling and the judgments of the two lower courts merely to indicate whether or not there existed grounds for the appellants concerning the coming to this Court on the present appeal. There was a good deal of persuasion by the advocate for the appellants with respect to the pinpointing of such parts of the challenged ruling as could be classified as falling within the above specific portion of Order XLIV Rule 1 (1). I would only say in passing that in my view the order that “its premises judgment be and is hereby vacated,” may not escape falling within “or for any other sufficient reason” for what I now conclusively state:

A review application has to be answered within the dictates of rule 3 of Order XLIV viz:

“3.(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application. (2) Where the court is of opinion that the application for review should be granted, it shall grant the same ...” (by reviewing the judgment)

The single question in this case is - what was the learned judge being asked to review? The procedural answer is - an appellate judgment of the High Court, which by the provisions of Section 71A(2) of the Civil Procedure Act, was already the final adjudication in this particular case as a matter of law. Procedurally, there was therefore nothing to review.

It may well be that the learned judge intended to make his appellate judgment crystal clear to the litigants but this was an unwarranted and prohibited exercise, which has left the litigants or one group of them,

still yearning for the appellate judgment which was unfortunately expressed to have been vacated. In my opinion, the application for review should have been promptly and summarily dismissed without entering upon any form of review of law or facts, and consequently, the first ground of appeal succeeds.

I deeply regret that a situation as this has been occasioned; particularly as the contention between the parties with respect to the land involved, dates as far back as from around 1951. However, courts cannot be unaware of the importance of land issues within the jurisdiction and their duty attending the same.

For my part, and for the statutory procedural reasons. I have given, I would allow this appeal from the review judgment of the High Court. I therefore agree with the orders proposed by Law JA.

**Potter JA.** I have had the advantage of reading in draft the judgment of Law JA. I agree with it and with the orders proposed.

**Dated and delivered at Nairobi this 19th day of March, 1982.**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**C.H.E MILLER**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**