REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANGA

ELC APPEAL NO. 12 OF 2017

MARGARET WANJIKU KIMANI - APPELLANT

VS

JOSEPH MUKABI GACHENGO - RESPONDENT

JUDGMENT

1. The record of Appeal was filed on the 8/5/17. In it, it is expressed that the appeal arises from the ruling of Hon A Mwangi, Senior Resident Magistrate in SRMCC 25 of 2007 – Kigumo delivered on the 30/4/14. I have perused the file and according to the record there is no ruling delivered by the said learned Senior Resident Magistrate Hon A Mwangi on the 30/4/14. The record however contains the ruling delivered by Hon A. Ogonda on the 30/5/14 and not Hon A Mwangi.The Appellant did not seek to amend the memorandum of appeal neither did the Respondent challenge it. There is no doubt from the Respondent's pleadings on record that he has responded to the appeal in terms of the ruling of Hon A. Ogonda. That notwithstanding it is the duty of the Appellant to present proper and correct pleadings. Improper pleadings are unacceptable. The Court shall proceed to determine the appeal against the Ruling of Hon A. Ogonda delivered on the 30/5/14.

2. On the 28/9/2007 the following orders were recorded in Land Dispute Tribunal (LDT) 25 of 2007 in the SRM Court at Kigumo as follows;

> "Upon considering that there is no appeal it is hereby ordered that the award read out to the parties on 24/8/2007 is hereby confirmed as the judgment of the Court i.e the objector Margaret Wanjiku Kimani to refund Kshs 115,000/- to the Plaintiff in three instalments. No orders as to costs".

3. On the 7/11/2007 the Respondent filed an application seeking a review of the orders of 28/9/2007 to include a time frame for the refund of the award to him. In his supporting affidavit filed on the 8/11/2007 he deponed that the aforestated orders did not state the time frame within which the refunds were to be made and therefore left it to the Court to determine. He proposed that Court the refund be made as hereunder; 5/12/2007- Kshs 80,000/-; 5/1/2008- Kshs 17,500/- and finally on 5/2/2008- Kshs 17,500/-.

4. On the 23/2/2009 the Court (Hon A Mwangi) delivered a ruling in in respect to the application of 7/11/2007 as thus;

> "First, I find that the orders sought have been overtaken by events. The Plaintiff seeks to be paid the sums from 5/2/07-5/2/08 yet the application was argued on 5/2/09. Secondly, I find that the Court has no jurisdiction to amend the orders of the Land Dispute Tribunal. The Applicant has not outlined what provisions of the law he bases his application on. The application herein is dismissed with costs."

5. Following the above ruling of the honourable Court, the costs of the application payable to the Defendant were certified by the Registry at the sum of Kshs 28,450/- as seen in the certificate of costs dated the 5/3/2009.

6. On the 22/4/2010, Execution ensued in form of a Notice to show cause (NTSC) why execution should not be issued against the Defendant (herein Appellant) in the sum of Kshs 116,700/- being the decretal amount cost of execution and Court collection fees and pursuant the judgement issued on 28/9/2007.

7. Irked by the notice to show cause, the Appellant filed an application on 7/5/2010 seeking orders for review of the Notice to show cause dated the 22/4/2010 and that the same be recalled and or set aside. Further she sought an order that the taxation carried out on the basis of the NTSC issued on 22/4/2010 together with all the related and subsequent orders be set aside. The application is grounded on the reasons thus; that the NTSC dated the 22/4/2010 was irregular and illegal and the Court may have been misled to so issue it; the notice is inconsistent unclear and ambiguous and is an error on the face of the record.

8. The Defendant then (now the Appellant) in her supporting affidavit dated the 7/5/2010 challenged the execution by way of NTSC by the Plaintiff (now Respondent). She contended that following the ruling of the Court delivered on the 23/2/2009 which interalia stated that the orders sought therein had been overtaken by events, there was nothing left for execution. That in any event the Court expressed itself as lacking jurisdiction to amend the orders of Land Dispute Tribunal dated the 28/9/2007. She argued that levying execution by the Plaintiff therefore, in the circumstances, was illegal and mischievous and the Plaintiff was in contempt of the Court for misleading and making misrepresentations to the Court.

9. The Respondent opposed the application and in his Replying affidavit dated 17/7/12 deponed that the orders of 28/9/2007 had not been set aside by the ruling of the honourable Court delivered on 23/9/2009. That the Respondent was within his rights to execute the judgment in his favour.

10. The parties made their arguments before the Court through written submissions filed on the 23/11/20 and 2/5/2014 respectively.

11. On the 30/5/14 the Learned Resident Magistrate, Ms A Ogonda delivered the ruling in which she dismissed the application dated the 7/5/2010. The Learned Magistrate agreed with the decision of Hon A. Mwangi that the Court did not have jurisdiction to vary, amend or set aside the Land Dispute Tribunal judgment confirmed on the 28/92007 and that indeed the orders were still in force because they were in no way set aside in any way by the ruling of 23/2/2009. Further that the Defendant failed to demonstrate any error apparent on the face of the record. Finally, that the Defendant had not made any efforts to satisfy the judgment in favour of the Plaintiff pursuant to the judgement dated the 28/9/2007.

12. Aggrieved by the above ruling the Appellant filed this appeal based on the grounds as thus; That the learned magistrate erred in law and fact ;

a. By her failure to consider find and note that there was a glaring error apparent on the record that needed the Court's intervention and resolution.

b. By her failure to note and make a finding that there were contradictory rulings and orders that needed to be resolved.

c. In her ruling that the sum claimed in the award was due and payable in total contradiction to a previous ruling of the Court.

d. By her failure to note and make a finding that the award which was null and void in law was not legally enforceable as the same was and remains illegal and or unconstitutional

e. In her finding and ruling that purported to amend and/or review an award from the tribunal in which case the Court had no jurisdiction.

13. On the 18/9/18 the parties elected to prosecute the appeal by way of written submissions. The Appellant filed her submissions on the 24/10/18 while the Respondent filed on 26/10/18.

14. The Appellant submitted that upon the delivery of the ruling of 23/2/2009 dismissing the Respondents application for review of the award dated the 7/11/2007 with costs, the Court proceeded to assess costs payable to the Defendant/Respondent in the certificate of costs dated the 5/3/2009. That at that point the case was marked finalised and the Respondent was getting the costs of the suit. That the Court thereafter in a glaring inconsistency issued a fresh NTSC against the Appellant seeking to execute and recover the decretal amount given in the orders of 28/9/2007. Conceding that the award of 28/9/2007 had no time frame for payment of the refund, the Appellant submitted that the Court did not have power to amend or alter it in any way. The Appellant opined that the Court in its ruling of 30/5/2014 disregarded its own record and orders dismissing the claim. She argued that the award of the tribunal was illegal and unconstitutional. That the tribunal acted ultra vires without jurisdiction in dealing with land that had a title and matters relating to contracts.

16. The Respondent submitted that the ruling of the 23/2/2009 dismissed the application seeking for review on grounds that it did not have jurisdiction but left the award dated the 28/9/2007 undisturbed. He contended that there are no glaring inconsistencies on the Court record and in any event the Appellant did not point out any. That the amounts payable in the Land Disputes Tribunal award remained payable by the Appellant to the Respondent the judgment had not been set aside or appealed against. Further the illegality or otherwise of the award was not before the Court and therefore the Court was not expected to render a decision in vain. In any event the Appellant did not plead the illegality of the award at all to make the Court apply its mind. No appeal has been filed against the award which remains valid and enforceable. He urged the Court to dismiss the appeal.

16. Having reviewed and considered the record of appeal in its entirety and the submissions before the Court, the key issues for determination are; Whether the trial magistrate's decision can be set aside; Whether the Appellant has set out a case for review; Whether there is an error apparent on the record; Whether the execution proceedings were a nullity.

17. The law is that the Court will not lightly differ from the findings of fact of a trial Court who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge (magistrate) is shown demonstrably to have acted on wrong principles in reaching the findings he did .See **Jabane v Olenja [1986] KLR 661** at Pg 664, **Ephantus Mwangi –Vs-Duncan Mwangi Wambugu (1982-88) 1 KAR 278** and **Mwanasokoni –Vs-Kenya Bus Services (1982-88) 1 KAR 870."**

18. Section 7 of the Land Dispute Tribunal Act Cap 303A (now repealed) states as follows;

"7(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The Court shall enter judgement in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act".

19. It is on record that the award of the LDT was adopted as the judgement of the Court on the 28/9/2007. In that award the refunds were to be made in three instalments. The time lines for the instalments were not stated therein. This is what prompted the Respondent to file an application seeking a time frame to be included as proposed in his application. He proposed that the refund be made between 5/12/07 -5/2/08. This application was correctly dismissed by the Court on the basis that the role of the Court was merely to adopt the award as a judgment of the Court and had no jurisdiction to amend vary or set aside the award. At this point the award had been confirmed as the judgement of the Court and if any party was aggrieved the right procedure was to appeal to the High Court for redress or file a review.

20. The grounds for setting aside discretionary orders are well known and have been set out thus : In **Shah v Mbogo** ***[1968] E.A. 93*** that

> "…… it is well settled that this Court will not interfere with the exercise of discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration of any matter which it should have taken into consideration and in doing so arrived at a wrong conclusion".

21. The orders of Hon. Ogonda made specific reference to the findings of her predecessor .She also specifically noted that the award and subsequent decree had not been set aside. In his view, the execution proceedings were properly placed since the Defendant had failed to satisfy the decretal amount.

22. It is trite that a successful litigant is entitled to the fruits of his judgment .The ultimate position that any the Court would take after the adoption of the award would be to proceed with execution of its decree .The Court rightfully declined to set aside the Notice to Show Cause. Further that the facts on record confirm that the Appellant participated in the execution proceedings without any objection when she appeared before the trial Court for mentions for compliance.

This coupled with the fact that the trial magistrate made her findings after she analyzed the submissions of the Defendant / Applicant vis a vis the facts on the record, this Court finds the decision was not based on any misapprehension or circumstances that were irrelevant.

23. What is irrelevant, with respect, is the new position that the Appellant has taken in this appeal .The Appellant has pleaded that the tribunal did not have jurisdiction to deal with registered land or matters on breach of contract .According to him, this was the finding of Hon. Mwangi SRM who dismissed the Plaintiff's application. The findings and basis of the dismissal have already been set out above and this was not the reason. Notably, Hon. Mwangi SRM held inter alia that the Court could not amend or set aside the award since her jurisdiction was limited its adoption as an order of the Court and in any event the proposal contained in the application had been overtaken by events in terms of dates on account that the repayment proposal was to run from 5/12/07 – 5/2/08. The application was argued in February 2009.

24. This Court notes that jurisdiction is everything and is an issue that ought not to be taken lightly before the trial Court seized with the matter since when the Court lacks jurisdiction it has no power to make any further step and must down its tools. See **The Owners of the Motor Vessel Lilian 'S'–Vs- Caltex Kenya Ltd (1989) KLR where, Nyarangi J.** held as follows:

> "I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it"

25. This Court agrees with the Appellant that the tribunal lacked jurisdiction to deal with registered land and/or matters on the law of contract as per Sec 3 (1) of the Land Dispute Tribunal Act. The provision of the Land Dispute Tribunal Act make this a reserve for the High Court and with the promulgation of the Constitution of 2010, this is now the province of the Environment and Land Court that with supervisory jurisdiction to set aside orders made by tribunals. See **Wanja Mwaniki vs. Chairman Gichugu D. Ldt & Another [2006] Eklr.** However, the Appellant / Defendant failed to move the High Court for an order to set aside the award. He opted to have it adopted and rode along the Plaintiff's attempts to recover the amount. This ground seems to be an afterthought since he never took out any proceedings to have the award set aside in the first instance. The question to be considered in this scenario is whether the Appellant's ground on account of jurisdiction and nullity of the award can be raised for the first time at the appellate stage.

26. In **Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR,** the Court held that the issue of jurisdiction can be argued at any time. The Court remarked as follows:

> "It has been held in the case of Kenidia Assurance Co. Ltd v Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."

27. However, the Court of Appeal has made several decisions upholding the principle that parties are bound by their pleadings; amongst them, **Independent Electoral & Boundaries Commission & another v. Stephen Mutinda Mule & 3 others [2014] eKLR** and **Kinyanjui Kamau v. George Kamau Njoroge**, c**ivil Appeal no 132 of 2005 [2015] eKLR.** The rule is that Courts must ensure that they maintain their role as independent and impartial adjudicators. This is the only way to ensure that they do not descend into the arena of conflict by framing new issues for determination, completely distinct from the issues pleaded and canvassed by the parties. This manifestly denies the relevant party the right of reply and compromises the terms of Article 50 (1) of the Constitution.

28. The decree and execution in the circumstances cannot be deemed to be void unless the High Court makes such declaration. This Court hesitates to make such finding unless there is a proper suit filed and served on relevant parties to give them a genuine chance to respond. This is in tandem with the overriding objectives to ensure justice is done to all parties in the adversarial system.

29. In respect to review, Order 45 Rule 1 of the Civil Procedure Rules provides that:-

> "(a) Any person considering himself aggrieved 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".

30. The Appellant preferred this appeal on the ground that there was ' **glaring** ' error that was apparent on the record which the trial Court failed to find. Also, that there were contradictory rulings and orders that needed to be resolved. The Appellant argued before the trial Court that findings on record holding that the decree was overtaken by events. Also, that the Court lacked jurisdiction. The trial magistrate perused the orders of her predecessor and held that these orders did not exist but seemed to be the Defendant/Appellant's making.

31. This Court has addressed this issue above and finds that the trial Court properly applied the provisions of Order 45. Further that the application could only be successful when the alleged error was clear and apparent on face of the record.

32. In **National Bank of Kenya Ltd –Vs- Ndungu Njau (CA) No 211/1996 UR** the Court of Appeal (**Kwach, Akiwumi & Pall JJA**) stated that

> "A review may be granted whenever the Court considers it 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……."

33. The same argument has been made to this Court and considering the facts of the case, the argument must fail since the trial magistrates properly addressed their minds to the Respondent's application for amendment of the award and declined to grant the orders due its limited jurisdiction to adopt the award as an order of the Court. The orders were not set aside.

34. The Appellant contends that there were contradictory rulings but has not set out what seemed to be contradicting in the rulings on record. He did not do this at the trial Court. The Court finds that this ground cannot be allowed as it did not form part of the grounds for review at the trial Court. The Court also finds that there is no apparent error based on this ground. The Court has perused the rulings of the learned Magistrates and notes that there is no disharmony between the rulings delivered on the 23/2/2009 and that of the 30/5/14.

35. In **Rose Kaiza –Vs- Angelo Mpanju Kaiza 2009 ,** the Court of appeal was categorical that ;

> **"**An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"
>
> "Application on this ground must be treated with great caution and as required by rule 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged."

36. Considering the above principles, it is clear that the Appellant's application for review could not be allowed .Especially when it is premised on facts that do not exist .Further that the fact that there was a different conclusion of facts or that the NTSC was issued erroneously would be a good ground for appeal and not review .The Appellant ought to have appealed against orders of by Mokua SRM which validated the decree and led to execution proceedings. This is what dissatisfied him. In the circumstances ground 1 & 2 fails.

37. The Appellant has further pointed out in Ground 4 that the trial magistrate erred when she failed to note that the award was null and void and not legally enforceable and that the award was illegal and unconstitutional.

38. The issue of validity of the award has already been addressed above .The Court has noted that where there is no appeal or orders setting aside a decree the Court orders remain binding on parties and the same ought to be enforced .The Appellant has contended that the award was illegal and unconstitutional .This ground has not been fortified before this Court and was similarly not raised before the trial magistrates during adoption, attempts to amend and execution.

39. The trial magistrate Court could not consider these facts and could not be said to have acted in err in any way unless the facts were urged before her.

40. The Appellant contends in ground 5 that the trial magistrate erred in law and fact in finding and purporting to amend an award from the tribunal which case the Court had no jurisdiction. However, the findings of the trial Court did not alter the tribunal's award in any way. He noted that the award was an order of the Court which had not been set aside and in the circumstances, he declined to set aside execution proceedings. The Appellant's application for review could not succeed. The Appellant /Defendant's interpretation of the ruling of Hon. Mokua is misplaced. Ground 5 fails.

41. Ground 3 similarly fails since there was no contradiction in his finding. The previous ruling was that the Plaintiff could not succeed in his attempt to amend the award at the magistrate's Court so as to include timelines for payment of the decretal sum. However, there was nothing to stop him from recovering the decretal sum. The Defendant did not settle any part thereof and the awarded sums fell due. There was no error or misapprehension of facts in this finding.

42. It is trite that a successful litigant is entitled to the fruits of his judgment unless there is reasonable ground to stay or set aside such execution. **In Machira T/A Machira & Co Advocates vs. East African Standard (No 2)** where it was held that:-

> "...…to be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in in accordance with the law and to prevent abuse of the process of the Court".

43. This Court notes that the Appellant had been evasive at the lower Court and seems to be hell bent to avoid settling the decretal amount. He does not dispute that he owes the Respondent the money. He did not contest the award before the trial Court at the first instance.

44. The Court has unfettered discretion to set aside an award, but this must be exercised judiciously to avoid a hardship or injustice to be suffered. The Court must be keen not to assist a party who is evasive or who is aimed at abusing the Court process. See also **Mbogo –Vs-Shah(1968) E.A. 93.**

45. In all circumstances justice must be done**,** the need for justice and right of appeal must be balanced with the competing interests that demand that litigation comes to an end, this is a reality in cases for review**.**

46. In **Benjoh amalgamated Limited & Another Vs KCB Limited [2014] eKLR,** the Court of Appeal held that;-

> **"**The case law on the subject of review jurisdiction shows that two principles seen to be in competition. There is the "Principle of finality" of litigation on the one hand which does not support review and there is "the justice principle" on the other hand which favours limited review predicated on the basis that the object of litigation is to do justice.

47. The overriding objectives as set out in Sec 3A & 1B of the Civil Procedure Act tie this Court to ensure that justice is achieved without delay and without undue regard to procedural technicalities and also that this must be within minimal available judicial time and resources. In **Stephen Boro Gitiha Vs Family Finance Building Society & 3 Others Civil Appeal Nairobi 263/2009** the Court held that

> "The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflicts with it must give way"

The Court further held that "……Courts are now on the driving seat of justice and have a new call to use the overriding objective in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner".

48. The Court is inclined to disallow the appeal to enable further execution of the decree.

49. In the upshot, the Court finds that the Appellant did not satisfy the ingredients for review before the trial Court and /or establish such error that was apparent on record .Further that the decree had not been set aside .The Appellant had not settled the decretal sums and in the circumstances the Notice To Show Cause and further taxation notice was properly issued. The trail magistrate properly addressed his mind to the facts and the applicable law and this Court finds no reason to fault her Ruling.

50. Consequently the appeal is dismissed with costs in favour of the Respondent.

51. Finally, the Court's attention was drawn to an allegation by the Appellant that the ruling of 23/2/2007 was incomplete. The Court notes that the complete handwritten ruling is on record. The Appellant annexed the same to her supporting affidavit dated the 7/5/2010 and she cannot turn around and claim that she did not have it.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF JANUARY 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Mboha HB Kirubi for the Appellant.

Respondent – Present in person. Advocate absent.

Irene and Njeri, Court Assistants