



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 2 OF 2016

MARY WANGARI KARENJU.....APPELLANT

VERSUS

FRANCIS MUIRURI KINYANJUI.....RESPONDENT

(Being an Appeal from the Ruling by the Honourable D Ole Keiuwa (Mr) Principal Magistrate, in Milimani CMCC No 4964 of 2010 delivered on 23rd May 2014)

JUDGMENT

1. On 12/8/2010, the appellant lodged a suit in the Chief Magistrate Court at Milimani against the defendant, seeking an eviction order in relation to Land Title Number Nairobi Block 117/297 (the **suit property**). She contended that she was the lawful owner of the suit property and the respondent was a trespasser thereon. The respondent neither entered appearance nor filed defence. On 14/12/2011, the trial court entered interlocutory judgment in favour of the plaintiff. Exparte formal proof hearing of the suit subsequently proceeded before Hon Ole Keiwua (PM) on 7/3/2012 and on 30/3/2012, the learned magistrate rendered a judgment in which he dismissed the appellant's suit on the ground that the appellant had not produced an official search to confirm the status of the parcel register of the suit property.

2. Subsequently, on 3/10/2013, the appellant filed a notice of motion dated 30/9/2013 in the same subordinate court seeking a review of the judgment. She attached an official search dated 28/6/2013 to the application and contended that failure to produce an official search at the substantive hearing of the suit was not deliberate. The official search indicated that the suit property was registered in the name of Paul Karenju Wambugu. The application was canvassed interpartes before Hon Ole Keiwua and on 23/5/2014, the learned magistrate rendered a ruling in which he declined to review his judgment. The learned magistrate was of the view that trespass is a continuing tort and the appellant could properly bring a fresh suit if he so desired. Secondly, the learned magistrate was of the view that the appellant had the option of preferring an appeal against the judgment.

Grounds of Appeal

3. Aggrieved by the Learned Magistrate's refusal to review his judgment, the appellant brought this appeal. The appeal was premised on the following verbatim grounds:

- 1. That the honourable magistrate erred in law and fact by dismissing the appellant's application dated 30th September 2013 seeking to review orders made on 30th March 2012.**
- 2. That the honourable magistrate erred in law and fact in finding that filing a certificate of search was not enough to grant an order of eviction.**
- 3. That the honourable magistrate erred in law by failing to have due regard and take into account the documentary evidence attached to the appellant's application dated 30th September 2013.**
- 4. That the honourable magistrate misdirected himself by finding that the appellant had failed to present adequate evidence to prove the claim and order for eviction**
- 5. That the honourable magistrate erred in law and in fact by finding the appellant's application unmeritorious and dismissing the same.**
- 6. That the honourable magistrate erred in law in failing to appreciate sufficiently or at all that there was no basis in law and fact upon which he could properly review the judgment he made on 30th March 2012.**

7. That the honourable magistrate erred in law and in fact by failing to take into account important considerations and thereby arriving at the wrong decision.

8. That the honourable magistrate erred in law and fact by completely ignoring the appellant's written submissions and all authorities cited whose copies were availed.

9. That the ruling and order of the honourable magistrate dated 23rd May 2014 is wrong in principle and unfair in effect.

Submissions

4. The appeal was canvassed through written submissions. The appellant's submissions focused on the following three verbatim issues: (i) whether the respondent registered any caution on the parcel of land **Plot No Nairobi/Block117/297**; (ii) whether the certificate of official search confirms the appellant to be the beneficial owner of the parcel of land; and (iii) whether the title deed and/or certificate of lease is in the name of the appellant's father Paul Karenju Wambugu.

5. The appellant submitted that the respondent had not registered any caution against the title and her title was issued procedurally. She added that the title registered in her late father's name was protected under Section 26(1) of the Land Registration Act. She further submitted that the certificate of search attached to the application confirmed that her late father was the registered proprietor of the Land. The appellant added that the respondent was a trespasser and the only remedy available to the appellant was an eviction order. Lastly, the appellant submitted that she was entitled to the suit property by dint of the certificate of confirmation of grant issued in Nairobi High Court Succession Cause No 1756 of 2003.

6. In response, the respondent submitted that the certificate of official search which the appellant sought to rely on was new evidence which could be obtained during trial. He added that the trial court was right in dismissing the appellant's notice of motion. Reliance was placed on **Alex Ouda Otieno v Orange Democratic Movement & another, Civil Appeal No. 194 of 2017** where the court dismissed an appeal because the court was not convinced that the evidence relied on could not be produced during trial or was not within the appellant's knowledge. He further submitted that in practice, an official search is a requirement to prove ownership of land. Reliance was placed on **Clement Kipchirchir & 38 others v Principal Secretary Ministry of Lands Housing and Urban Development & 3 others Nakuru ELC Petition No. 42 of 2013** where the court was of the view that a search was an important document to determine ownership of the land. Lastly, it was submitted that the trial magistrate acted in accordance with the law in dismissing the appellant's application.

7. I have looked at the entire record of the trial court and I have considered the grounds set out in the memorandum of appeal. I have similarly considered the parties' respective submissions and authorities. Further, I have considered the relevant legal framework and jurisprudence on the key question in this appeal.

8. This is an appeal challenging the trial court's failure to review its judgment under Order 45 rule 1(a) of the Civil Procedure Rules. Although the appellant itemized 9 grounds of appeal, the single issue falling for determination in this appeal is whether the trial magistrate failed to properly exercise his review jurisdiction under Order 45 rule (1) (a) of the Civil Procedure Rules.

9. The principles upon which a court of law exercises review jurisdiction in relation to a judgment or ruling, be it before the same bench or before a broader bench of the same court, are well settled and were not too long ago restated by the Supreme Court of Kenya in **Parliamentary Service Commission v Martin Nyaga Wambora & Others (2018) eKLR** 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. Sight should never be lost of the shore that in an application for review, like the one before the court, 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 satisfaction of this court, that in exercise of its discretion, the limited bench acted whimsically or misdirected itself in reaching the decision it made."

10. It is therefore settled law that the power to review a judgment is a discretionary and equitable jurisdiction which requires that the applicant satisfies the mandatory criteria in Order 45 of the Civil Procedure Rule and lays a basis to the satisfaction of the court before that jurisdiction is exercised. Secondly, an application for review is not an appeal or a chance for the applicant to re-argue or re-litigate his case. Thirdly, in an appeal challenging a trial court's failure to exercise review jurisdiction over its judgment, the appellant has a duty to demonstrate to the satisfaction of the appellate court how the trial court erred in the exercise of its discretion or how it exercised its discretion whimsically. Fourthly, an appeal challenging the trial court's exercise or failure to exercise review jurisdiction ought to focus on the decision of the court on the review application, not on the merits of the substantive judgment in respect of which a review was sought. Fifthly, the appellant is required to demonstrate that the trial court misdirected itself in the exercise of review jurisdiction and consequently arrived at the wrong decision occasioning an injustice to the appellant.

11. In the appeal under considerations, the trial court rendered its judgment on 30/3/2012 and declined to grant the appellant an eviction order because the appellant had failed to produce an official search showing the status of the parcel register of the suit property. The appellant elected not to lodge an appeal against the judgment. Eighteen months later, the appellant filed an application seeking a review of the judgment. Attached to the review application was an official search dated 28/6/2013, meaning that it was procured fourteen months after the impugned judgment and four months before the filing of the review application. The review application was subsequently declined by the trial court.

12. In declining to review its judgment, the trial court rendered itself thus:

"a search certificate is not a new thing for the applicant to bring to the knowledge of the court as she knew when she was

testifying as represented by counsel. Trespass is a continuing offence and the cause of action is alive. In my view, the applicant could have preferred an appeal or file a fresh suit. My hands are tied as I cannot change what I call my judgment of 30/3/2012. I have no jurisdiction to”

13. It is quite clear from the above background that the appellant sought to re-litigate her case by procuring an official search fourteen months after judgment had been rendered and inviting the court to review its earlier judgment and grant her an eviction order based on the recently procured official search. In so doing, the appellant did not make any attempt to satisfy the requirements of Order 45 of the Civil Procedure Rules. She was required to demonstrate that she had obtained an important matter or evidence which she was hitherto not able to obtain after exercising due diligence or that the new matter or evidence was not within her knowledge at the time she testified and closed her case. In my view, the appellant having failed to satisfy the requirements of Order 45 rule 1 of the Civil Procedure Rules, the trial court properly declined to review its judgment.

14. I have on my own carefully gone through the grounds of appeal and the submissions presented by the appellant in respect of this appeal. Those submissions focus on the merits of the judgment of the court as opposed to focusing on the trial court’s exercise of discretionary review jurisdiction under Order 45 rule 1 of the Civil Procedure Rules. Focus on the merits and demerits of the impugned judgment is of no help to the appellant in this appeal because this court is not seized of an appeal against the impugned judgment. This court is seized of an appeal against the trial court’s decision not to review its judgment of 30/3/2012.

Disposal Orders

15. In light of the foregoing, it is my finding that this appeal lacks merit and is for dismissal. The appeal is accordingly rejected. The respondent shall have costs of the appeal.

DATED, SIGNED AND READ AT NAIROBI ON THIS 23RD DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Mwendo for the Appellant

Court Clerk - June Nafula