



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA NO. 15 OF 2018

MICHAEL AFUDHO AOKO.....APPELLANT

VERSUS

JOAB ODUOR OTIENO

CHRISTINE ACHIENG OINDO

MICHAEL ODHIAMBO ODOL.....RESPONDENTS

RULING

The Appellant filed this application dated 15th July 2019, seeking orders for the transfer of the original file SIAYA PMCC MCL & E NO. 50 of 2018 to Siaya Principal Magistrate's Court for hearing and determination of the Notice of Motion dated 15th May 2019 (at the Magistrate's Court for review of the judgment).

The application is based on the grounds that the judgment and orders for permanent injunction and eviction issued by the Siaya Magistrates Court was based on an error apparent on the face of the record since the court did not take into account that the Appellant/Applicant and his family has been living on and/or is in continuous occupation of the suit property since 1998 and acquired rights over the suit property by way of adverse possession. That the appeal is not the best way to challenge the judgment since there were *inter alia* lack of proper representation and a lot of error apparent on the face of the record that can only be rectified by way of a review. That there will be no prejudice to the Respondent should the order be granted. That if orders not granted, the application will be rendered nugatory and the Appellant rendered homeless.

Respondent's Reply

In his replying affidavit the Respondent stated that this application's true purpose was to unprocedurally appeal the decision of the lower court. The Respondent was adamant that the lower court decision was heard on merit and the dissatisfied party was only entitled to an appeal through the lawful process. The Respondent stated that the application at the lower court of 15th May 2019 seeks to challenge the entire decision of the court, which is tantamount to an appeal.

Issues for Determination

1. Whether an application for review filed after lodging an appeal is competent

Order 45 Rule 1 provides:

(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 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.

The Court of Appeal in African Airlines International Ltd v Eastern and Southern African Trade and Development Bank [2003] 1 EA 1 further elucidated the legal position of a review filed after lodging an appeal thus:

“Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with.”

In Rosemary Wanjiru Njiraini v Officer in Charge of Station Molo Police Station & another [2019] eKLR, the court held:

“The mere filing of a Notice of Appeal does not divest one of the right to file an application for review... If a substantive appeal is filed, then clearly, the same party cannot file an application for review, for in such instance, he will already have exercised his right of appeal.”

Analysis

The Applicant lodged a substantive appeal on 22nd June 2018. The Applicant’s Notice of Motion application for review at the lower court is dated 15th May 2019. It therefore follows that so long as this appeal subsists, the application for review is a nullity.

2. Whether application for transfer of the lower court file ought to be allowed

Having found the application for review at the lower court is a nullity, this application must fail. The only options open to the Applicant, as was succinctly stated in the letter from the Deputy Registrar dated 13th June 2019, is either to withdraw or terminate this appeal to pursue a review at the lower court or to abandon the intention to seek a review and carry on with this appeal. It would be an abuse of the court’s process to allow a review of the lower court judgment while an appeal from the same judgment is already under way.

For this reason, it is my opinion that this application ought to be dismissed with costs.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2019.

In the presence of:

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A. O. OMBWAYO
ENVIRONMENT & LAND
JUDGE