REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CIVIL APPEAL NO. 8 OF 2016

KAPSIRAN CLAN.....APPELLANT

VERSUS

KASAGUR CLAN.....RESPONDENT

RULING

This is an appeal arising from the ruling of the Chief Magistrate's Court at Eldoret by Hon. Mr. T. Olando, Resident Magistrate in Eldoret CMCC No. 47 of 1987 dated 6.4.2016 but eroneosly referred to in the record of appeal as 6.03.2016. The application under determination was dated 28.1.2016 wherein the applicant had applied for the setting aside, discharge of the orders issued on the 14.7.2015. The grounds for the application were that on the 5.1.2016, Bartolomeo Kipkore Suter together with other members of the clan were threatened with eviction by the officer commanding Police Division, Marakwet East on the basis of orders of eviction issued on the 14.7.2015, which orders were made for purposes of enforcing decree dated 6.4.1984 when the honourable court adopted the elders' award. He also stated that the decree was no longer enforceable by dint of powers of section 4 of the Limitation of Actions Act.

Raphael K. Yego, an elder of the defendant's clan in the replying affidavit states that the application if frivolous, pegged on half-truth. That judgment was delivered in 1984. There is no appeal against the judgment pursuant to the judgment, the respondent took out eviction orders against the applicant on 29th July, 1985 and 29th November, 1987. The eviction orders were effected and the applicants moved out but they trickled back forcefully. Application to set aside the eviction order was dismissed. The court re-issued the eviction order on 22.12.2003. On 14.1.2004, an application to set aside the eviction order was dismissed. Therefore, the judgment is not time barred. The respondent stated that in any event, the applicant has already moved out.

The Lower Court in its very brief ruling held that the applicant had never featured in the suit either as a member of the Kapsiran Clan or a representative of the clan. The appellant was dissatisfied and filed this appeal on grounds namely:

1. ***That taking into account the totality of the evidence presented, the Honourable Magistrate misdirected himself in both fact and law in dismissing the application dated.***

2. That taking into account the totality of the evidence presented, the Honourable Magistrate misdirected himself in both fact and law in dismissing the appellant's application without giving the grounds for the determination thereof.

3. That the Honourable Magistrate misdirected himself both in law and fact in failing to appreciate that the decree in Eldoret CMCC No. 47 of 1987 having issued on the 6th of April,

1984 has been rendered stale and/or time barred and thus not enforceable.

4. That the Honourable Magistrate misdirected himself both in law and fact in failing to appreciate that no further execution could be carried out on the basis of a decree that is time barred.

5. That Honourable Magistrate erred both in law and fact, in failing to appreciate the full import and effect of section 4(4) of the law of limitation.

6. That the Honourable Magistrate erred both in law and fact, in failing to appreciate the full import and effect of section 4(4) of the law of limitation.

7. That the Honourable Magistrate erred in both fact and law in acting on the wrong principles of law and thereby arriving at the wrong conclusion.

8. That the Honourable Magistrate erred both in fact and law by failing to correctly evaluate the law and the material placed before it and thereby arrived at a wrong conclusion.

The appellant submits that this court has jurisdiction to entertain an appeal from an order for review. He cites section 75 of the Civil Procedure Act and Order 43, Rule 1(1)(1)(x) of the Civil Procedure Rules.

Secondly, the appellant submits that the Hon. Magistrate erred in dismissing the appellant's application for review as the application for execution for judgment was time barred. Moreover, that the applicant was a member of the appellant. The appellant further argues that the land in contention is community land as per Articles 63 of the Constitution. The appellant further argues that time in a judgment starts running when it is delivered and that no action can be brought on a judgment after 12 years. The provision of section 4(4) of the Limitation of Actions Act applies from when judgment was delivered.

The respondent submits that the application before the lower court dated 28.1.2016 was for orders that the orders issued on 14.7.2017 be set aside and/or discharged. There is no application under Order 45 of the Civil Procedure Rules. The respondent further submits that the appellant ought to have obtained leave to appeal as an appeal is not as of right.

On the question, as to whether the Magistrate properly exercised his discretion in dismissing the application, the respondent submits that the enforcement of the order for eviction was not time barred as the first attempt to evict was made in 1985 and that what followed was re-issuance of eviction orders.

As a first appellate Court, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*

This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in ***Watt –vs-Thomas (1), [1947] A.C. 484.***

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

The appropriate standard of review established in these cases can be stated in three complementary principles:

(a). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

(b). In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

(c). It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

The facts of this matter are that the appellant approached the elders' tribunal in 1983 on the land dispute between the appellant and the respondent over the boundary and ownership of Enoi Farm in Korou Sublocation Tot division. The matter had been heard severally by a panel of elders and the magistrates court without a resolution but no solution was made and therefore it was referred to the panel of elders under the Magistrates Jurisdiction Amendment Act ,1981. The panel of elders heard the dispute and found that the appellant had not adduced sufficient evidence to prove that the respondents had violated the boundaries between the two clans. The decision was adopted by the court on the 29th of September 1986 whose import was that the appellants were to move away from the suit land. The court issued several eviction orders until on the 14th July 2015 when the court issued a final eviction notice against the appellant. The O.C.P.D., Marakwet East was to supervise the eviction.

On the 28th January 2016, Bartolomeo Kipkore made an application to discharge these orders of the court which application was dismissed because he was not a party to the dispute though a member of the clan.

I have considered the submissions of parties and do find that the application is made by Bartolomeo Kipkore Suter, a member of Kapsiran Clan the purported appellant who never appealed against the eviction order. He applied for setting aside of orders made by the Lower Court in a matter where he is not party.

The application was not for review under order 45 of the Civil Procedure Rules as the same was for discharge and setting aside of a ruling on grounds that 12 years had lapsed after judgment and therefore the judgment was stale and could not be enforced.

Section 80 of the Civil Procedure Act which is the substantive law relating to Review provides: -

> **"Any person who considers himself aggrieved as by a decree or order from which an appeal is allowed by this Act, <u>but from which</u> <u>no appeal has been preferred.</u>**
>
> **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 order therein as it thinks fit".**

On the other hand, the procedural provisions of order 45 (1) of the Civil Procedure Rules provides that: -

> "**45 (1) Any person considering himself aggrieved- as by a decree or order from which an appeal is allowed, <u>but from which no appeal has been preferred; or</u>**
>
> **(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 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.**
>
> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being responded, he can present to the appellate court the case on which he applies to the review".**

It is trite law that any person who consists himself aggrieved by a decree or order from which an appeal is allowed by the Civil Procedure Act but from which no appeal has been preferred or by a decree or order which no appeal is allowed by the Civil Procedure Act, that person may apply for review of judgment to the court which pursued the decree or made the order and the court may make such order

The applications of this nature are guided by the principles of discovery of a new and important matter or an error apparent in the face of record.

I do not see any new or important matter discovered by the appellant that could have made the learned Magistrate to set aside the orders that had been granted for eviction.

On whether the learned trial Magistrate properly applied the law, I do find he properly applied the law when dismissing the application as the applicant Bartolomeo Kipkore Suter had never acted or featured in the suit and therefore could not camouflage himself as the clan to file the application dated 28th January 2016. He had no authority to represent the appellant.

On the issue of limitation, I do find that the judgment was made in 1984. The respondent took out eviction orders against the appellant on 20.07.1985 and 29.11.1987. The eviction order was subsequently re-issued on 22.12.2003. On the 14th January, 2004, the appellant applied for setting aside the eviction

order but the same was dismissed on 25.10.2003. The eviction order was re-issued on 2.11.2006 and on 14.7.2015.

The upshot of the foregoing is that the judgment made in 1984 did not lapse as 12 years have not lapsed since the last process of execution on 14th of July 2015.

I do find that the learned Magistrate properly applied the law and the appeal is dismissed with costs.

Dated and delivered at Eldoret this 28th day of June, 2018.

A. OMBWAYO

JUDGE