Ronoh v Kiplagat (Environment and Land Appeal E010 of 2022)
[2024] KEELC 89 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 89 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E010 OF 2022

CG MBOGO, J

JANUARY 24, 2024

BETWEEN

THOMAS KIMUTAI RONOH ..... APPELLANT

AND

JOHN KIPYEGON KIPLAGAT ..... RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court at Narok (Hon. S.M. Mungai, CM delivered on 25th October, 2022 in Narok CM ELC Case No.181 of 2018)

JUDGMENT

1. The appellant herein, being dissatisfied with the ruling and consequential orders of Hon S. M. Mungai delivered on 25th October, 2022, appealed to this court vide a memorandum of appeal dated 23rd November, 2023 against the whole ruling on the following grounds: -

    1. That the trial court erred in law and in fact in holding that the appellant herein did not supply new evidence to necessitate a review of the judgment delivered on 26th October, 2021.

    2. That the trial magistrate erred in law and in fact in failing to find that the appellant herein had not obtained the witness statement of Noonkipa Ene Kepenei from the Narok CID which new evidence demonstrate the fraudulent character of the respondent when he tried to sell parcel no. CisMara/Ololulunga/1259 in the sale agreement dated 15th August, 1997.

    3. That the trial magistrate misapprehended the law and fact and failed to find that the sale agreement dated 13th May, 1997 was a forgery and a subject of criminal investigations by the Narok DCI.

    4. That the trial magistrate erred both in law and fact in failing to observe the discrepancies in the sale agreement dated 13th May, 197 in contrast with the sale agreement dated 15th August,

1997 and that the postal address of the firm of Rodi, Orege & Company Advocates belongs to Winners Chapel Church and therefore the sale agreement dated 13th May, 1997 was a fraud.

5. That the trial magistrate erred both in fact and in law in failing to find that the respondent failed to attend the meeting of the Land Control Board held on 22nd September, 2011 and which evidence is new.

6. That the trial magistrate erred both in fact and in law in failing to find that the address of Rodi, Orege & Company Advocates as indicated in the letter dated 26th September, 2011 is P.O. Box 780, Nakuru and not P.O. Box 13623, Nakuru hence the fraud of the sale agreement dated 13th May, 1997. The appellant obtained new information from the DCI, Narok.

7. That the trial magistrate erred in law and fact by failing to find that the sale agreement dated 15th August, 1997 drawn and attested by the firm of Mungai Mbugua & Company Advocates was the valid sale agreement signed by both parties and advocate R.L.M Mbugua of the same law firm.

8. That the trial magistrate erred in law and fact by failing to take into consideration that since the appellant was put in possession of the suit property and has lived there for uninterrupted period of over 12 years a constructive trust was created and the doctrine of adverse possession came into play.

2. The appellant prays that the appeal be allowed with costs and the ruling and subsequent orders against him be set aside and the application dated 15th November, 2021 be allowed.

3. The grounds of appeal were canvassed by way of written submissions.

4. On 23rd October, 2023, the respondent filed his written submissions dated 29th September, 2023 where he raised one issue for determination which is whether the appellant's appeal is merited and should be allowed.

5. On this issue, the respondent submitted that a mere perusal of the application shows that the appellant was dissatisfied with the judgment of the trial court, more so on the validity of the sale agreement dated 13th May, 1997. Further, that no new evidence was annexed to the application to support his position. Further, that the appellant alluded to an error on the face of the record which error does not exist. The respondent relied on the cases of National Bank of Kenya versus Ndungu Njau, Civil Appeal no. 211 of 1996 [1995-98] 2 EA 249 and Wanjiru Gikonyo & 2 Others versus National Assembly of Kenya & 4 Others [2016] eKLR.

6. The respondent further submitted that the only way to correct the alleged misapprehension of the law concerning the said sale agreement was to appeal the decision, unless the error is apparent on the face of the record and requires no elaborate argument to expose. Further, that the appellant did not state or demonstrate any sufficient grounds that would have warranted the court to issue the orders of review sought. Reliance was placed in the case of *Nasibwa Wakenya Moses versus University of Nairobi & Another* [2019] eKLR.

7. The respondent further submitted that the lower court was clear and unequivocal in its judgment when it granted the orders. That in the review application, the appellant sought to have the sale agreement dated 13th May, 1997 and 15th August, 1997 be taken for forensic examination by the Directorate of Criminal Investigations which is a new prayer that was not pleaded in the appellant's counter claim. Further, that the facts adduced by the appellant in his review application was aimed at re-opening the case to introduce new causes of action which could only be heard in a fresh suit or in an appeal.

8. By the time of writing this judgment, the appellant had not filed his written submissions. Be that as it may, I have considered the grounds of appeal, the written submissions filed by the respondent as well as the authorities cited and the issue for determination is whether the appeal has merit.

9. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all, or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni versus Kenya Bus Service Ltd* 1982 – 88 I KAR 278.

10. It should be noted that this is an appeal against the ruling of an application for review of the judgment delivered on 26th October, 2021 by Hon. G. N. Wakahiu. As such, the instant appeal will be confined to the review application only and its merits or otherwise.

11. The respondent filed a plaint dated 10th April, 2015 seeking the following orders: -

    a. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.

    b. A declaration that the defendant, whether by himself or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly trespassers on the same.

    c. An eviction order against the defendant from CisMara/ Ololulunga/ 13957 and CisMara/ Ololulunga/13958 which was previously Narok/ Cis Mara/Ololulunga/1279.

    d. A permanent injunction restricting the defendant herein and his agents/servants or otherwise howsoever, from remaining on or continuing in occupation of the suit property.

    e. Special damages amounting to Kshs. 265,000/=.

    f. General damages.

    g. Costs of the suit together with interest.

12. On 9th November, 2017, the appellant filed his defence and counter claim seeking the following orders: -

    a. An order of specific performance compelling the defendant herein to surrender the two title deeds for land parcel CisMara/ Ololulunga/13957 and CisMara/ Ololulunga/ 13958 arising from the subdivision of Narok/ CisMara/ Ololulunga/1279 as well as seek and obtain the land board consent to transfer the same into the name of the plaintiff herein.

    b. In the alternative a refund of the sum of money being a consideration amount already paid to the defendant by the plaintiff plus a penalty for breach of contract based on the concurrent market price.

    c. A permanent injunction against the plaintiff.

    d. Costs of the suit and interest at court rates.

13. The matter before the trial court was heard and judgment was delivered on 26th October, 2021.The appellant thereafter filed an application dated 15th November, 2021 which was expressed to be brought under Order 1 Rule 10 (2), Order 45 Rules 1 and 2, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders: -

1. Spent.

2. Spent.

3. Spent.

4. Spent.

5. Spent.

6. That the honourable court be pleased to set aside the judgment delivered on 26th October, 2021 and all other consequential orders therein be reviewed, set aside and/or varied.

7. That this honourable court be pleased to order the DCI, Narok to subject the sale agreements dated 13th May, 1997 and 15th August, 1997 to thorough forensic document examination- and present the report to this honourable court

8. The costs of this application be provided for.

14. In the application, the appellant contended that the court made an erroneous finding that he is in breach of the agreement signed on 13th May, 1997 and the court relied on the agreement to enter judgment against him. Further, that the erroneous judgment did not consider that the agreement dated 13th May, 1997 is a forgery taking into consideration the signatures and the address of the law firm said to have prepared the agreement for sale. The application was supported by the affidavit of the appellant which was filed on even date. The application was opposed by the replying affidavit of the respondent sworn on 24th January, 2022. Both parties filed their written submissions which culminated to the ruling delivered on 25th October, 2022 that is the subject of this appeal.

15. Section 80 of the *Civil Procedure Act* provides as follows: -

> " 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."

16. Order 45 Rule 1 of the *Civil Procedure Rules*, further provides: -

> " 1.
>
> (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."

17. In *Republic versus Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, Mativo, J (as he then was), culled out the following principles from a number of authorities: -

> " i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
>
> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
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> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
>
> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
>
> viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
>
> ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

18. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-

    a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

    b. on account of some mistake or error apparent on the face of the record, or

    c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

19. I have perused the impugned ruling and I note that the trial court in arriving at its determination observed that it had considered all the issues that were raised in the suit, and delivered itself and any invitation to reverse the findings which would be tantamount to an appeal on the said determination. In my analysis, the appellant failed to meet the above conditions. The fact that the appellant believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope.

20. The trial court, in my view, arrived at a reasonable conclusion based on the application and the documents in support thereof. I, therefore,see no reason why I should disturb that finding.

21. Arising from the above, the memorandum of appeal dated 23rd November, 2022 lacks merit and it is hereby dismissed with costs to the respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JANUARY, 2024.

HON. MBOGO C.G.

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

CA:Meyoki