



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. APPEAL CASE NO. 6 OF 2018 (FORMERLY HCCA NO. 80 OF 2016)

ZAID NASSAR ALI.....APPELLANT

VERSUS

OMAR NASSAR ALI.....1ST RESPONDENT

KHADIJA NASSAR ALI.....2ND RESPONDENT

HALIMA NASSAR ALI.....3RD RESPONDENT

(Being an appeal from the Ruling and order of the Kadhi's Court at Kisumu. (Hon. SUKYAN HASSAN OMAR, Principal Kadhi dated 10/10/2016 and delivered on 19/10/2016)

JUDGMENT

This is an appeal arising from a ruling of the Kadhi's Court at Kisumu in Kisumu Kadhi's Court Succession Cause No. 70 of 2008 in respect to the estate of NASSAR ALI (deceased). The ruling being appealed against herein arose out of an application by way of a Notice of Motion for review dated 10th October 2016 which application sought to review a judgment of the Kadhi's court which was delivered on 6th June 2012

The brief background of this case as can be gathered from the record of appeal is that the deceased herein NASSAR ALI died on 9th October 1997 leaving behind the following surviving him;

- a) MARIAM NASSAR ALI (Widow)
- b) OMAR NASSAR ALI (Male adult)
- c) SAID NASSAR ALI (Male adult)
- d) ISMAEL NASSAR ALI (Male adult)
- e) HABIB NASSAR ALI (Male adult)
- f) SOFIA NASSAR ALI (Female adult)
- g) KHADIJA NASSAR ALI (Female adult)
- h) ZENA NASSAR ALI (Female adult)
- i) KHADRA NASSAR ALI (Female adult)
- j) HALIMA NASSAR ALI (Female adult)
- k) FATMA NASSAR ALI - (Female adult)

From the record of appeal it is stated that the widow also passed on sometimes in the year 2003 leaving behind the above mentioned children surviving her and the husband. That the respondents filed a petition No. 10 of 2008 seeking for grant of letters of administration in respect to the deceased's estate whereby in the said petition, the respondents alleged that the appellant had forged documents and caused the

following plots to be registered in his name and that the same should form part of the deceased's estate;

- a) Plot No. 48A and 48B at Sondu Market.
- b) SOUTH NYAKACH/DIANG'A EAST/1365.

The petition was heard and the court was urged to determine the following issues:

- a) Whether the appellant forged the documents in respect to the disputed plots.
- b) Whether the said plots were part of the estate of the said NASSAR ALI (the deceased herein) at the time of his death.
- c) Whether the said plots belonged to the appellant.

The Court heard the parties and delivered a judgment on 7th September 2012 whereby the court found that plots No. 284/1365 at SOUTH NYAKACH/DIANG'A EAST and plot No.48 (formerly plot No. 8/813) at Sondu belonged to the appellant (who was the respondent then). Further that the deceased once owned the said plot but later legitimately transferred the same to the respondent (appellant) long before his death.

It is further on record that a Notice of Motion dated 10th February 2016 was filed by ALI NASSAR ALI seeking for the following orders;

- a) That the court may be pleased to review its judgment delivered on 6th July 2012 and set aside orders in clause 2 of the judgment and the decree issued on 6th July 2012 which says that the properties No. 48(A/B) and 284/7365 belongs to the respondent.
- b) The court finds that the said properties No. 48(A/B) and 284/1365 belong to the deceased NASSAR ALI and be distributed as part of the estate.
- c) The cost be paid by the respondent.

The application was premised on the following grounds;

- a) That there is a new evidence which was not there at the time of hearing.
- b) That there is apparent error on the face of the record.
- c) That it is in the interest of justice that the judgment be reviewed.

The appellant opposed the application and the court delivered a ruling on 19th October 2016 allowing the review with the following orders;

- a) The review is allowed.
- b) The two properties; plots Nos. (A and B) at Sondu Market and KISUMU/DIANG'A EAST/1365 do revert to the estate of the late NASUR ALI and be distributed among the heirs.
- c) The applicant is awarded the costs of the application.

The following background is the one that has triggered the current appeal against the ruling of the Kadhi. The appellant has listed six grounds of appeal as follows:

- a) THAT the Learned Kadhi erred in Law and in fact by finding that there was new evidence to warrant a review of the earlier ruling/judgment delivered on 6th July 2012.
- b) THAT the Learned Kadhi had no jurisdiction to entertain the said application and deliver the said ruling.
- c) THAT the properties in question herein which were subject of the review were registered in the name of the appellant long before the death of the deceased herein and the same did not and could not in any way form part of the estate of the deceased herein. The Kadhi therefore erred in Law and in fact in finding that the same was part of the estate of the deceased herein and including them as so.
- d) THAT the Learned Kadhi failed to appreciate that there was unreasonable delay in seeking the review orders which delay was not explained and therefore the same went against the rules of review envisaged by order 45 Rule I of the Civil Procedure Rules 2012, the provision under which the application was brought.
- e) THAT the learned Kadhi failed to appreciate that a review order sought on the grounds that there was new evidence which the Respondents alleged was not within their knowledge or could not be adduced by them when the decree or order was passed or made

required strict proof of such allegations.

f) THAT the learned Kadhi erred in Law by entertaining a matter which was not within his jurisdiction as the same was touching on ownership of land under the Land Act, 2012.

Counsel agreed to canvass the appeal by way of written submissions which were filed.

Appellant's Counsel's submission

Counsel for the Appellant submitted on ground 1 that the trial court erred in law and in fact by finding that there was new evidence whereas the purported new evidence was not proved strictly to the court as required by Order 45 Rule 2(2) of the Civil Procedure Rules) during the hearing as the said purported new evidence was merely a suspicion. It was further Counsel's submission that the allegation of fraud was never proved by the witnesses, but the court went ahead to find that there was fraud in the transfer of the parcels of land in question from the name of the deceased to the name of the appellant herein.

It was Counsel's submission that the court subjected the allegation of fraud to a police investigation which was done by a CID officer one C.P. MIRUKA ONYANGO who came to the conclusion of fraud because he was not able to see supporting documents on how the transfers were done. It was his submission that the court made an erroneous finding. Counsel stated that the parcels of land in question were legally transferred to the appellant and registered in his name.

Further it was on record that the said officer wrote a letter dated 2nd May 2016 to the Lands office Nyando-Awasi whereby the Lands office responded to the same vide a letter dated 2nd June 2016 Ref. No. NYD/LR/GEN/VOL/167 confirming that land parcel No. KISUMU/NYAKACH/1365 was legally transferred by the deceased herein to the appellant. Counsel submitted that this clearly established that the suit parcel was transferred by the deceased before he passed on.

It was therefore Counsel's submission that the two parcels of land were registered in the name of the appellant before the demise of the deceased herein and therefore could not form part of the estate of the said deceased.

The other ground of appeal that Counsel submitted on was the inordinate delay of filing an application for review on 10th February 2016 for a judgment that was delivered on 6th June 2012 being a period of 4 years without an explanation. Counsel stated that the period of 4 years was unreasonable and therefore the same was against the provisions of order 45 Rule I (b) of the Civil Procedure Rules hence the court was wrong in entertaining the said application. It was also Counsel's submission that at the time of filing both the Succession Cause and the application for review, the subject parcels of land in dispute were already registered in the name of the appellant herein under the Registered Land Act(Repealed) therefore the court had no jurisdiction to hear the review application. Counsel further faulted the review application being heard by the same Kadhi and being read by a different Kadhi. He therefore urged the court to allow the appeal as prayed

Respondent's Counsel's Submissions

Counsel for the respondent opposed the appeal by submitting that the new evidence was a report from the Chief Officer Lands Housing and Physical Planning on the current status of plot No. 48 Sondu market which report was from Land Registrar Nyando. It was Counsel's submission that the two reports made the court authorize an investigation report from the Director of Criminal Investigation which was delivered on 2nd June 2016, which proved that the lands were fraudulently transferred and the appellant was asked to produce the relevant documents but failed to do so.

Counsel further submitted that the application for review was proper as no appeal had been preferred against the judgment and that the Kadhi had the jurisdiction to hear and determine the application. Further that the plot was registered under the appellant's names long before the death of the deceased in trust because he had a loan. The appellant helped to repay the loan to avoid ICDC from taking the land from the deceased.

Counsel also submitted that the application was made within reasonable time and that the Kadhi did not determine the ownership of the land, but made his ruling after the police investigation report which confirmed that the land was fraudulently transferred to the defendant He therefore urged the court to dismiss the appeal with costs and uphold the finding and judgment of the lower court delivered on 19/10/2016.

Analysis and Determination

It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

I have considered the Record of Appeal, as well as the submissions by Counsel and come to the conclusion that the issue for determination is as to whether the properties in question herein which were subject of the review were registered in the name of the appellant long before the death of the deceased herein, whether there was unexplained inordinate delay in the filing of the application for review and whether the Kadhi had jurisdiction to deal with ownership of land that had title. Lastly whether the suit properties formed part of the estate of the

deceased.

Civil Procedure Rules Order 45 rule 1 states that:

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.

Order 45 Rule 1 is the operative procedure for review and the catch words are that there should be 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 at the time the decree was passed**. The other important catch word is without unreasonable delay.

From the record of appeal it is clear that the parties filed a succession cause for grant of letters in respect of the estate of the deceased. They must have known the properties that they wanted to administer with the grant. They were also aware that there was some loan which was purportedly taken using the suit properties as security and they admittedly stated that they wanted to hide the properties from being auctioned by ICDC. If this is the position then they knew about the existence of these facts and the property.

The respondents further stated that the Appellant was holding the suit properties in trust for the beneficiaries of the estate of the deceased. This evidence of trust did not come out during the hearing and that the issue of trust required proof. This was not the case. The way the evidence for review was taken to establish fraud needed more than just commissioning a report from the investigative agencies. Had the fraud been specifically pleaded or strictly proved? I find that there was no new evidence to warrant a review as parties are under obligation to put all their claims together and not piecemeal. The issue of fraud could not have been sufficiently canvassed during an application for review.

The other issue is that the application for review was brought four years down the line. There was inordinate delay which was not explained. The Kadhi should not have entertained an application for review which had been filed after a period of 4 years. If any action was to take place within this period then undoing the same would lead to gross injustice for a party.

Discussing the scope of review, the Supreme Court of India in the case of **Ajit Kumar Rath vs State of Orisa & Others** had this to say:-

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

I am in agreement with what is stated above that a review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. The reviewing of the earlier judgment by the Kadhi amounted to a fresh hearing and correction of what the Kadhi perceived as an erroneous view. This also amounted to sitting on his own judgment.

The earlier judgment of the Kadhi was sound and supported by documentary evidence that the suit properties did not form part of the deceased estate. He later faulted the same vide a review which in my respectful view was not sound.

I have considered the record of appeal, the submissions by Counsel and find that the learned Kadhi erred in reviewing his earlier sound judgment. I find that the appeal has merit and is therefore allowed and the Judgment dated 7th September 2012 whereby the court found that plots No. 284/1365 at SOUTH NYAKACH/DIANG'A EAST and plot No.48 (formerly plot No. 8/813) at Sondu belonged to the appellant is hereby reinstated with costs.

DATED and DELIVERED at KISUMU this 4TH DAY OF DECEMBER, 2018.

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of 1st and 3rd Respondents, Court assistant Joanne, and in the absence of the Appellant.

M. A. ODENY

JUDGE