REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E L C A CASE NO. 28 OF 2014

(FORMERLY CIVIL APPEAL NO. 63 OF 2012)

NJERU NTHIGA……1ST APPELLANT

SIMON NJUKI ……...2ND APPELLANT

TITUS MWANIKI…….3RD APPELLANT

PHILIP NJUKI……..4TH APPELLANT

VERSUS

PASTOR SAMUEL NGUU.....1ST RESPONDENT

PASTOR DOMINIC MUNYI *(Suing on behalf of* NATIONAL AKOLINO)...2ND RESPONDENT

JUDGEMENT

1. On or about 17th November 2011 the Appellants filed a notice of motion under Order 45 Rules 1 and 2 of the Civil Procedure Rules seeking a review and setting aside of the judgement delivered by the Hon. S.M. Mokua SPM on 10th November 2011 in Siakago PMCC No. 64 of 2010. The said application was based upon two grounds namely;

    a. *That there was an error apparent on the face of the record.*

    b. *There was sufficient cause to review the said judgement.*

2. The gist of the Appellants' application for review before the Learned Senior Principal Magistrate was that although they had filed written submissions before judgement, the same were missing from the court file hence they were not considered in arriving at the judgement delivered on 10th November 2011. The said application for review was heard and dismissed on 5th April 2012 by the court hence this appeal. In his ruling, the learned magistrate held that the issues raised in the Appellants' submissions were duly considered in the judgement save the question of *locus standi* which he considered in the ruling but still found no reason to disturb the judgement.

3. Appellants' being aggrieved by the said ruling raised the following grounds of appeal as shown in their memorandum of appeal dated 2nd May 2012.

    a. *The trial magistrate erred in law in stating that the submissions which were not before him when*

writing judgement were not adequate to enable him review his judgement. (sic)

b. That the trial magistrate erred in law in not finding that his judgement ought to have been reviewed on the face of the submissions which were not before him when writing judgement on the following accounts;

i. The trial magistrate failed to take notice that in the statement of plaint paragraph 1 – 15 of particulars of special damages were nowhere tabulated or specifically pleaded as required by law to enable the magistrate to award anything at all to do with special damages. The award of special damages he made was misconceived. (sic)

ii. The trial magistrate erred in law in belabouring on a valuation report on development done on land parcel No. NTHAWA GIBURI/929 which in law are not recoverable as submitted in submissions in light of sections 22 (b) cap 302 and authority attached in submissions HCC 589/1977.

iii. The trial magistrate erred in not viewing his judgement in view of submissions to the effect the plaintiff did not have locus standi to sue on behalf of a church which church was not named in the sale agreement as a party. (sic)

4. It would appear that counsels for the Appellants and Respondents agreed to dispose of the appeal through written submissions. Consequently, the Appellants filed their submissions on 2nd March 2015 whereas the Respondents filed theirs on 13th March 2015.

5. In their written submissions, the Appellants faulted the judgement of the trial court delivered on 10th November 2011 on several grounds viz;

a. The trial magistrate was wrong in awarding Ksh 157,500/- being the value of developments on the suit property whereas recovery thereof was barred under the Land Control Act (Cap 302).

b. The trial magistrate erred in law in awarding the said amount when there was no prayer in the plaint for refund on account of such developments.

c. The trial magistrate erred in awarding the Respondents Ksh 10,000/- as general damages on account of a sale agreement which was void in law under the Land Control Act.

6. For all the above reasons, the Appellants submitted and contended that the learned trial magistrate ought to have reviewed and set aside his own judgement. It should be noted that the Appellants' submissions appear to have mutated from an appeal challenging the ruling delivered on 5th April 2012 to one challenging the judgement delivered on 10th November 2011.

7. The Respondents in their written submissions supported the ruling of the trial magistrate delivered on 15th April 2012 and opposed the appeal. The Respondents maintained that the Appellants had failed to demonstrate any error apparent on the face of the record or other sufficient reason for a review of the said judgement. They submitted that the issues raised in the Appellants' written submissions before the trial court were fully considered in the judgement hence there was no need to review or set it aside.

8. The Respondents also submitted that most of the issues raised in the memorandum of appeal were new issues which were not canvassed during the application for review before the trial court. It was further submitted that the record of appeal was defective because the memorandum of appeal was not accompanied by a certified copy of the order appealed against in violation of the provisions of ***Order 42 Rule 2 of the Civil Procedure Rules***. They therefore asked the court to dismiss the appeal with costs.

9. Before considering the merits of the appeal, I would like to quickly dispose of one technical objection raised on the competency of the appeal. The Respondents have submitted that the appeal is fatally

defective because of the Appellants' failure to file a certified copy of the order appealed against as required under ***Order 42 of the Civil Procedure Rules***. I am of the view that such an omission is curable under the provisions of ***Article 159 (2) (d) of the Constitution of Kenya 2010, and section 19 of the Environment and Land Court Act.*** This court is obligated to hear the merits of the case as opposed to shutting out parties on account of violation of technical rules of procedure. The court therefore overrules the said objection.

10. The jurisdiction of the court to entertain applications for review is governed by ***Order 45 of the Civil Procedure Rules***. The court has a wide discretion in reviewing a decree or order in instances falling within the grounds provided for under the said order. However, it should always be borne in mind that there is a distinction between an appeal and review.

11. In the case of ***Njoroge & 104 Others (suing in a representative capacity for Kariogangi South Civil Servants Estate Tenant Purchasers) Vs Savings and Loan Kenya Limited and Another [1990] KLR 78***, it was held as follows:

> ***a. A point which may be a good ground of appeal may not be a good ground for an application for review.***
>
> ***b. That an erroneous view of evidence or law is not a ground for review although it may be a good ground for an appeal.***
>
> ***c. An application for review should not be taken as a form of appeal.***
>
> ***d. To warrant a review of an error alleged to be on the face of the record, such error must be so clear as to be without dispute.***

12. This court is also aware that in entertaining the application for review, the trial magistrate was exercising judicial discretion hence this court should only interfere if satisfied that the trial court clearly misdirected itself, or failed to take into account some relevant factor or considered some irrelevant material in consequence whereof it arrived at a wrong decision. See ***Mbogoh Vs Muthoni and Another [2006] 1KLR 199.***

13. The 1st ground of appeal faults the trial magistrate for failing to review his judgement of 10th November 2011 to enable him consider the Appellants' written submissions. The trial court considered this issue and arrived at the conclusion that all issues in the submissions save one were actually considered in the judgement. The issue of *locus standi* of the Respondents to sue on behalf of the Akolino church was considered in the review application and the court found against the Appellants. In the result, the trial court found no reason to interfere with the judgement.

14. The court is unable to find any misdirection on the part of the trial magistrate in the manner in which he exercised his discretion. There is no material on record to demonstrate that he failed to take into account some relevant factors or that he took into account some irrelevant factors in the exercise of judicial discretion. If the trial magistrate considered the Appellant's submissions during the review application and still concluded that there was no reason to disturb the judgement that does not constitute an error of law apparent on the face of the record.

15. The 2nd ground of appeal has three limbs which basically attack the merits of the judgement of the trial court delivered on 10th November 2011. It faults the court for awarding special damages which were not particularized in the amended plaint; for awarding compensation for developments on the suit property in violation of the Land Control Act; and for failing to find that the Respondents had *locus standi* to sue on behalf of the church.

16. There appears to be a contradiction between the Appellants' memorandum of appeal and their written submissions on the issue of special damages. Whereas the memorandum faults the trial court for improperly awarding special damages, the written submissions laud the trial court for not awarding

special damages. The court also notes that no submission was made on the issue of *locus standi* which appears as a ground of appeal in the memorandum.

17. Be that as it may, this court is of the opinion that if the trial court erred in various matters of law as submitted by the Appellants, then those could constitute good grounds of appeal and not grounds for review. An application for review which seeks to correct erroneous conclusions of law made by a judicial officer would be tantamount to an appeal. It is not tenable for a judicial officer to sit on appeal over his own judgement.

18. In the case of ***Njoroge & 104 Others Vs Savings and Loan Kenya Limited & Another (supra)***, the court referred to ***Mulla on the Indian Code of Civil Procedure*** as follows:

> ***'There is also a helpful passage in the 13th Edition of Mulla on the Indian Code of Civil Procedure where Order 47 Rule 1 on review is discussed and at page 1672 it states:***
>
> ***"A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error that is apparent on the face of the record may sometimes be thin. It can be said of an error that is apparent on the record when it is obvious and self-evident and does not require an elaborate argument to be established."***

19. In view of the foregoing, the court finds no merit in the appeal hence all the grounds of appeal fail. The consequence of this is that the Appellants' appeal is hereby dismissed with costs to the Respondents.

20. It is so decreed

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **21st day** of **SEPTEMBER, 2017**

In the presence of Mr Mogusu for the Respondents and in the absence of the Appellants.

Court clerk Njue.

Y.M. ANGIMA

JUDGE

21.09.17