



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO.48 OF 2010

(Being an Appeal from the decision of the Provincial Land Appeals Tribunal at Mombasa made on the 21st day of September, 2010 in Land Appeal No.373 of 2005)

MPENZWE NGOBA MTANA

BIJUMA NGOBA MTANA(suing as the Administrators/Legal representatives of the Estate of the late DON MAURICE MUTANA.....APPELLANTS

=VERSUS=

ZUHURA SHABAN.....RESPONDENT

R U L I N G

1. In my Judgment of 28th March, 2014, I dismissed the Appeal on the sole ground that the Memorandum of Appeal had been filed in this court on 27th September, 2010, one year after the decision of the Appeals Committee without the leave of the Court.
2. The Appellant has now filed an Application dated 3rd April 2014 seeking to review of my Judgment on the basis that there is a mistake and an error apparent on the face of the record. The Application is also seeking for an order of stay of execution of the decision of Appeals Committee pending the hearing of the Appeal by this Court.
3. According to the depositions of the Appellants, this court relied solely on the handwritten decision of the Provincial Land Dispute Appeals Committee which was erroneously dated 21st September, 2009 when in fact the decision was delivered on 21st September, 2010.
4. It is the deposition of the Applicants that the Appellants received a notice for the from the Coast Provincial Land Disputes Appeal Committee notifying the Appellants late father that the Judgment of the Appeal Committee was to be delivered on 21st September, 2010 and that the Respondent did admit this fact in her Replying Affidavit.
5. The Respondent has opposed the current application for review. It is the Respondent's deposition that he never received the alleged notice on when the Appeals Committee was to deliver its Judgment and that the alleged hearing notice is a doctored document and a forgery; that Appeals Committee heard the matter on 20th May, 2009 and a Judgment was delivered on 21st September, 2009 and that if there were any errors in the Judgment of the Committee, then the said errors ought to have been brought to the attention of the Committee and corrected by the same Committee and not this court.
6. I have considered the submissions by counsels which are on record.

Analysis and findings

7. The only issue which I am supposed to determine is whether the Appeals Committee delivered its Judgment on 21st September, 2010 or 21st September, 2009. 48
8. If I find that the decision of the Appeals Committee was delivered on 21st September, 2010, then I will be under a duty to review my Judgment which was solely based on the ground that the Appeals Committee delivered its decision on 21st September, 2009 and hear the Appeal on its merits. I say so because the discrepancy of the date in the decision of the Appeals Committee would be an error apparent on the face of the record which was defined by the Court of Appeal in the case of **Muyodi vs Industrial & Commercial Development Corporation & Another E.A.LR(2006) EA 243 at pages 246-247** as follows:-

“There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reassuring or points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal”.

9. In the case of **Michael Mungai vs Ford Kenya Elections & Wominebirs Board & 2 Others(2013) e KLR**, the High Court held that for one to succeed in having an order reviewed for mistake or error apparent on the record he must demonstrate that the order contains a mistake that is there for the whole world to see.
10. In the case of **National Bank Ltd -Vs- Ndungu, Civil Appeal number 211 of 1996**, the Court of Appeal stated the law regarding review as follows:

“A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omissions must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”

11. The Appellants in this case attached on their Record of Appeal the handwritten proceedings of the Appeals Committee in Land Appeal case No.373 of 2005. In that case, Don Maurice Mutana, now deceased, was the Appellant. The current Appellants are the administrators of the Estate of the said Don Maurice Mutana by virtue of the Limited letters of administration which were issued to them on 21st September, 2010.
12. It is clear from the proceedings that the evidence of the Appellant’s late father and Respondent was taken on 20th May, 2009. However, what is apparent on the face of the decision of the Appeals Committee is that the Appeal was dismissed on 21st September 2009. The decision was then signed by the chairman and two members.
13. The handwritten proceedings and decision of the Appeals Committee was certified as true copy of the original on 21st September, 2010. Those proceedings and the decision of the Committee form part of the Record of Appeal that was filed in this Court on 5th September, 2012. The Memorandum of Appeal was filed on 27th September, 2010, according to the official receipt.
14. The Appellants position is that the decision of the Appeals Committee was made on 21st September 2010 and not 21st September 2009 as indicated in the decision of the Appeals Committee.

15. In his Replying Affidavit sworn on 30th November, 2010 the Respondent at paragraph 3 stated as follows;-

“THAT it is true that on 21st day of September, 2010 I won the land case and was awarded Plot No. Kilifi/Roka/977 by the Provincial Land Dispute, Mombasa.”

16. However, the Respondent's advocate, while submitting stated that the decision of the Appeals Committee was made on 21st September 2009 and not in the year 2010.
17. The Appellants have annexed on the current Application for review a hearing notice (Form 2) that was prepared and signed by the Chairman of the Tribunal and forwarded to the Appellant's late father through the Chief of Roka Location. In the notice, the appellant was being notified that the determination of the appeal had been fixed for 21st September 2010 at 9.00am. The notice is dated 3rd September, 2010. On the face of the notice, it has been indicated that the same was received by the Senior Assistant Chief on 9th September, 2010 and forwarded to the Appellant.
18. Although the Respondent has denied ever receiving a separate notice inviting him to attend court for the delivery of Judgment, he insists that he was present when the Judgment by the Appellant's committee was made on 21st September, 2009 after they were heard on 20th May, 2009.
19. The Respondent has annexed on his Replying Affidavit the typed proceedings of the Appeals Committee which have been certified as true copies of the original. In those proceedings, it is indicated that the late Don Maurice Mutana and the Respondent were heard on 20th May, 2009 and a decision was made on 21st September, 2009.
20. It is improbable that after hearing the parties, on 20th May, 2009, the Appeals Committee reserved its decision until 21st September, 2010, which is over one year down the line. It is also improbable that three members of the Committee signed the decision with a date of 21st September, 2009 without noticing the said error.
21. Indeed, the person who certified the proceedings and the decision of the Appeals Committee on 21st September, 2010 should not have certified the decision with the purported erroneous date. It is at the point of certification that the error on the issue of the date, if at all it was an error, should have been corrected considering that the Appeals Committee was still in existence as at 21st September 2010.
22. Considering that the Proceedings that are being relied on in the Appeal show that the decision of the Appeals Committee was made on 21st September, 2009, it will be unprocedural at this stage for this court to hold that the decision of the Appeals Committee was made on 21st September, 2010 and not 21st September, 2009. Those proceedings form part and parcel of the Record of Appeal. The purported error is not self-evident on the part of this court or the Appeals Committee.
23. This court cannot rely on a hearing notice that was purportedly issued to the Appellant in the absence of an affidavit of the person who said to have prepared and signed the said hearing notice. In any event, the said hearing notice does not form part of the Record of Appeal.
24. In the circumstances and for the reasons I have given above, I dismiss the Appellants' Application dated 3rd April, 2014 with costs.

Dated and delivered in Malindi this 31st day of July, 2014.

O. A. Angote

Judge