Khamis & 2 others v Kalume & 19 others (Civil Appeal E057 of 2021) [2024] KECA 1923 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 1923 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E057 OF 2021

KI LAIBUTA, PM GACHOKA & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

ABDULHAKIM ABEID KHAMIS ..... 1ST APPELLANT

JAMAL ABEID KHAMIS ..... 2ND APPELLANT

MOHAMED ABEID KHAMIS ..... 3RD APPELLANT

AND

KAHINDI CHARO KALUME ..... 1ST RESPONDENT

WILSON NDORO MWANYUNI ..... 2ND RESPONDENT

MGANDI YAWA ..... 3RD RESPONDENT

MAMBO NZURI ..... 4TH RESPONDENT

FATUMA MAZERA ..... 5TH RESPONDENT

BANDIKA NGAO NYERENYERE ..... 6TH RESPONDENT

RASHID ALI DUTO ..... 7TH RESPONDENT

MWAMTA NGALE BESAHA ..... 8TH RESPONDENT

RASHID KOMBO MGUYO ..... 9TH RESPONDENT

MWANAJUMA NYOTA ..... 10TH RESPONDENT

JUMAA RUWA ..... 11TH RESPONDENT

EPHASON CHIRINGA KOMBO ..... 12TH RESPONDENT

ALI MBAJI MWINYI ..... 13TH RESPONDENT

KAKONO MKAUMA ..... 14TH RESPONDENT

KOKOI MRINZI ..... 15TH RESPONDENT

ANNE MLONGO RUMBA ..... 16TH RESPONDENT

CHITSESO CHITOJA ..... 17TH RESPONDENT

THE LEGAL REPRESENTATIVES OF CASSAM SULEIMAN SUMAR & HAJI DADA KUMBERI EXECUTORS OF THE ESTATE OF HAJI SULEIMAN SUMAR KHAM ..... 18TH RESPONDENT

HAKIKA TRANSPORT SERVICES LTD ..... 19TH RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA ..... 20TH RESPONDENT

(An appeal against the ruling and order of the Environment and Land Court of Kenya at Mombasa (Munyao, J.) delivered on 17{{^th}} May 2021 in ELC No. 194 of 2010)

JUDGMENT

1. This appeal arises from a ruling of the Environment and Land Court (the ELC) at Mombasa (Munyao, J.) dated 17th May 2021 in ELC Case No. 194 of 2010. The appellants sought to review the judgment dated 30th October 2014 (Mukunya, J.) in favour of the respondents to the effect that they had acquired 132 acres out of the 162 acres of land parcel no. 387 (original No. 280/2 V/MN) by way of adverse possession. The learned Judge further directed that subdivision of the land be undertaken within 6 months from the date of the judgment, and that 132 acres be transferred to the respondents with the remaining 30 acres left to the appellants.

2. On 27th August 2020, the appellants filed an application dated 27th August 2020 seeking leave to be joined as defendants, and that the judgment dated 30th October 2020 be set aside. The respondents opposed the application.

3. The court considered the application on its merits. Dismissing the application in its entirety with costs, the learned Judge (Munyao, J.) held:

> " There is nothing, absolutely nothing, in these two titles to suggest that they resulted from a subdivision of the suit land. The title of the suit land was annexed to the Originating Summons when it was filed in the year 2010 and there is truly no reference to any subdivision of that land to produce the titles MN/V/2403 and MN/V/2618. From what I can see, the only subdivisions are for the two parcels acquired by the Government, which are LR Nos. 387/1 Section V, and 387/3 Section V. There is also nothing in the supporting affidavit, such as a subdivision plan, or any other material, that can sustain the allegation that the two plots are a subdivision of the suit land. I am left in wonder, where the applicants got the idea that what they hold resulted from a subdivision of the suit land. Without any evidence that the titles of the applicants came from the suit land, there is no need of making any further analysis of the application and no point in saying more."

4. Aggrieved by this ruling, the appellants have preferred this appeal. They jointly filed a notice of appeal dated 17th May 2021 and a memorandum of appeal dated 15th July 2021 that raised 6 grounds impugning the findings of the ELC. We have taken the liberty to summarize them as follows: that the learned Judge misconstrued the facts as set out in their application dated 27th August 2020; that the Judge failed to consider the appellants' submissions; that the learned Judge exercised his discretion injudiciously; that the learned Judge dismissed the application on a technicality without appreciating

its substance; and that the effect of dismissing the application was to deny the appellants the right to enjoy those rights set out in articles 40 and 50(1) of *the Constitution*.

5. Based on the foregoing, the appellants' prayer is that the appeal be allowed by setting aside the ruling dated 17th May 2021. In effect, the ruling be substituted for an order setting aside the judgment dated 30th October 2014 and order joinder of the appellants as defendants. In that vein, they urged for leave to defend the suit.

6. When the appeal was called out for hearing on the GoTo Meeting virtual platform, Mr. Mutana appeared for the appellants, Mr. Tindi appeared for the 1st to 17th respondents and Miss. Njeri Njuguna appeared for the 20th respondent. The 18th and 19th respondents were not present despite having been duly served with a hearing notice. The appeal was disposed of by way of written submissions with brief oral highlights.

7. The appellants relied on their written submissions dated 6th May 2022. In summary, it is the appellants' position that the learned Judge exercised his discretion wrongly, and that he disregarded the appellants' submissions regarding the history of the land in dispute.

8. The 1st – 17th respondents relied on their joint written submissions dated 13th May 2022. They submitted that the ruling of the trial court was proper and sound for the following reasons: that subdivision on the suit land had not been carried out as at the time the suit was filed; that the appellants' purported claim of subdivision did not arise in respect of the suit land; that the learned Judge considered the facts, the appellants' submissions and the law before arriving at a just conclusion; that a party could not seek to be joined in a suit that was determined 6 years before the application; and that the right to be heard as enshrined in *the Constitution* did not succor an indolent litigant.

9. The 20th respondent relied on its written submissions dated 28th October 2022. It submitted that the trial court was functus officio after 30th October 2014 when judgment was rendered in the trial suit. It argued that the appellants did not have locus standi to institute the application for review since they failed to establish any proprietary interest in the suit land. Finally, it submitted that the appellants were undeserving of the orders sought because the application was filed with inordinate and reprehensible delay.

10. We have considered the grounds of appeal and examined the record of appeal, the rival submissions and the authorities that were cited. In our view, all the grounds of appeal challenge the manner in which the learned Judge exercised his discretion. Therefore, those grounds will stand or fall once we determine whether the learned Judge exercised his discretion properly. Put differently, was there a miscarriage of justice?

11. An application for review is governed by the provisions set out in section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules. A court may review its decision on the 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; on account of some mistake or error apparent on the face of the record; or for any other sufficient reason. It is trite that whatever the ground may be, the application must be filed timeously.

12. From the facts as discerned from the record, the application for review was based on the following grounds: that the appellants were never served with summons to enter appearance; that the suit proceeded without their participation; that they are the registered owners of the property known as CR 45219 subdivision No. MN/V/2403 and CR 59000, L.R No. MN/V/2618, which allegedly emanated from a subdivision of the land in dispute; and that the decree effectively cancelled their titles.

13. It is clear that the application for review was not hinged on the discovery of new and important matter or evidence. After considering all the material placed before him, the learned Judge concluded that there was no evidence, that the titles belonging to the appellants, morphed from the subdivision of the suit land. Consequently, no basis lay for the prayer for joinder in the suit or for setting aside the judgment that had been delivered way back on 30th October 2014.

14. On whether the application for review was premised on account of some mistake or error apparent on the face of the record, the Court in Nyamogo & Nyamogo vs. Kogo [2001] EA 170 enunciated the constituent elements of an error on the face of the record as follows:

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

15. The Indian Supreme Court in S. Murali Sundaram vs. Jothibai Kannan (2023) 13 SCC 515, citing order 47 rule 1 of their CPC held:

> "Power of review may be exercised when some mistake or error apparent on the fact (sic) of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on the points where there may conceivably by two opinions."

16. We have extensively analyzed the record. We do not find that the reasons furnished arose out of an error apparent on the face of the record. Indeed, one glaring question is why the appellants took 6 years to file the application for review. While there is evidence on record that there was a related suit namely, Mombasa ELC No. 335 OF 2017, the appellants are less than candid in claiming that they were not aware of the dispute involving the suit land.

17. In that regard, did the application establish any sufficient reason for it to be allowed? This Court in Shanzu Investments Ltd vs. Commissioner of Lands [1993] eKLR articulated what amounts to sufficient reason as follows:

> " any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous."

18. The Indian Supreme Court in Govt. of NCT of Delhi Through the Secretary, Land and Building Department & Another vs. M/s. K.L. Rathi Steels Limited and others (2023) 03 SC CK 0097 held as follows:

> " review will be maintainable for "any other sufficient reason", and has narrowed the scope of this ground to mean a reason sufficient on grounds at least analogous to those specified in the rule."

19. Taking the above cue, we find that the appellants failed to demonstrate any sufficient reason for the court to exercise discretion in its favour. Indeed, as held by the learned Judge, the appellants failed to demonstrate that the properties which they claimed as their own, namely C.R. 45219 subdivisions no. MN/V/2403 and C.R. No. 59000 L.R. No. MN/V/2618 arose from the suit land, namely plot no. 387 (original 280/2).

20. In addition, we find that the appellants were forum shopping. We say so because they also sought to be joined in Mombasa ELC No. 335 of 2017 - Hardi Govid Ruda vs. National Land Commission & 4 others and based their suit on false allegations in Mombasa ELC No. 1 of 2020 - Abdulhakim Abeid Khamis & 2 others vs. Kahindi Charo Kalume & 16 others. They were intent on casting a net at sea to catch any fish at bay. To them, they were hell bent on defeating the respondents' titles. Furthermore, they were well aware of the dispute all along having served as directors of the 19th respondent. We have nothing more to say other than to state that indeed the appellants failed to establish sufficient grounds for review.

21. Consequently, we conclude that the appeal herein lacks merit. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR