Mbarak & 4 others v Mikaya (Civil Appeal E058 of 2021) [2024] KECA 637 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 637 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E058 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

AMINA MBARAK .... 1ST APPELLANT

IBRAHIM MBARAK .... 2ND APPELLANT

JUMA MBARAK .... 3RD APPELLANT

SALIM MBARAK .... 4TH APPELLANT

SULEIMAN MBARAK .... 5TH APPELLANT

AND

RASTO GWIYA MIKAYA .... RESPONDENT

(Being an appeal against the Ruling of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 3rd June 2021 in ELC Case No.110 of 2019)

JUDGMENT

1. The respondent, Rasto Gwiya Mikaya, filed suit against Charo Ruwa Mwagona and the appellants being Mombasa Civil Case No 453 of 2000. In the suit, the respondent claimed that the Charo Ruwa Mwagona and the 1st appellant were husband and wife, while the 2nd, 3rd, and 4th appellants were their children, and that the 1st appellant and Charo Ruwa Mwagona owned and lived on the suit property Plot No 77 Mutondia Settlement Scheme (the suit property).

2. It was the respondent's case that he purchased the suit property from the Charo Ruwa Mwagona, by way of a sale agreement dated 12th November 1988 for a consideration of Kshs 12,175, and that the appellants had refused to grant him vacant possession of the property, hence the suit. At the time the suit was heard, Charo Ruwa Mwagona had passed on, and the suit was taken over by his son, the 2nd appellant, Ibrahim Mbarak.

3. On their part, the appellants denied the claim and stated that it was well known to the respondent that Charo Ruwa Mwagona had some mental issues and was hoodwinked into selling him the suit property. They claimed that the respondent fraudulently obtained Charo Ruwa Mwagona's signature and fraudulently procured transfer of the suit property and that, therefore, the transaction was a nullity. The appellants filed a counterclaim and prayed that the transfer be cancelled and the suit property revert to them.

4. Upon considering the matter, the trial Judge dismissed both the respondent's suit and the appellants' counterclaim. The decision prompted the appellants to file a Notice of motion dated 11th July 2019 praying that the court reviews the ruling dated 11th November 2005; that the defence case be reopened and reheard: and that they be allowed to adduce new evidence.

5. The application was brought on the grounds that, since the ruling was delivered, that new and important evidence relating to the suit property, which was not within their knowledge, had been discovered; that it had emerged that the suit property as described in the pleadings at the time of hearing and delivery of the ruling did not exist as it had been sub-divided by the respondent and new titles created before the suit was filed; that, as at the time of institution of the suit, the hearing and delivery of ruling, the respondent did not own the suit property as pleaded in his Plaint; that at the time of the hearing, the new titles sub-divided from the suit property had already been sold to a third party by the respondent, and that the respondent had not disclosed this information to the court; that had a disclosure been made before delivery of ruling, the court would not have arrived at the conclusions reached; that the new evidence was not within the knowledge of the appellants at the time of hearing, and it was only just that the ruling be reviewed and set aside to enable the new evidence to be placed before the court.

6. It was further averred that there was also an error apparent on the face of the record in that, although the court found that the respondent did not legally purchase the suit property from the 1st appellant and had dismissed his case, the court omitted to order for the return of the suit property and title deed to the 1st appellant and that, as a result of this omission, the respondent continued to cling onto the suit property which a court had found was not lawfully acquired by him.

7. The application was opposed. In a replying affidavit sworn on 28th October 2019, the respondent asserted that the ruling was delivered on 11th November 2005, and that no explanation was provided as to why this application was brought after 14 years; that the application was inordinately late and without any reasonable cause; that, further, there was no reason why the defence case should be re-opened and re-heard as there was no new evidence to be adduced; that the sub-division of the suit property was undertaken and separate titles issued in 1999; that, if the appellants had been diligent, they would have conducted a search and confirmed this to be the position.

8. He further contended that the appellants had earlier on filed Malindi ELC No 54 of 2015 raising similar issues, but that the suit was struck out in a Ruling delivered on 15th November 2018; that they have not appealed against the dismissal of their Counterclaim in that case; that, in addition, there was no error apparent on the face of the record, and that the appellants were inordinately late in seeking this correction.

9. In a Ruling dated 3rd June 2021, the trial judge held that the appellants had not adduced sufficient grounds to warrant a review of the decision; that the application was brought 14 years after the ruling and that, they had not provided any reason to explain the delay and, therefore, the application was an abuse of the court process; that the court observed that the appellants had filed a suit in Malindi ELC No 54 of 2015, which was dismissed for being *res judicata* to this suit and that, in the court's view, the

application for review was an attempt by the appellants to relitigate. The Court proceeded to dismiss the application.

10. Aggrieved by the ruling, the appellants have filed an appeal to this Court on grounds that: the learned Judge was wrong in finding that the appellants had not demonstrated that they had exercised due diligence in the discovery of the new evidence; in finding that the appellants application had not been brought within reasonable time of the discovery of the new and important evidence; in finding and holding that there was no error apparent on the face of the record; and in holding that no sufficient cause had been shown to warrant the review of the ruling.

11. When the appeal came up for hearing on a virtual platform, learned counsel for the appellants, Mr. Shujaa, relied on their submissions in their entirety where it was submitted that the learned Judge did not state whether the application was *res judicata* in respect of Mombasa HCCC No 453 of 2000 or Malindi ELC Case No 54 of 2015; that no application had been filed in either suit in which the new evidence or error apparent on the record was alleged to have been discovered and determined between the parties prior to the appellants' Notice of Motion being filed to justify the issue of *res judicata* being raised.

12. Counsel for the appellants further submitted that there was an error apparent on the face of the ruling because the decision resulted in the parties being placed in the same position as they were before the institution of the suit, which has occasioned a failure of justice.

13. It was submitted that the status quo still exists to date, and that no prejudice would be occasioned to the respondent or to third parties if the application was allowed, and that this was a proper case for the learned Judge to invoke his inherent jurisdiction to correct the injustice by reviewing the ruling and setting it aside with all the consequential orders, and directing that the suit be re-heard afresh.

14. On their part, learned counsel for the respondent, Mr. Odhiambo submitted that the learned Judge rightly found that the appellants' notice of motion was *res judicata*, frivolous and misconceived; that the learned Judge properly examined and evaluated the application, the replying affidavit and rival submissions, and made a considered and proper ruling; that the appellants did not respond to the respondent's assertion that they failed to carry out any searches or make any effort to establish the changes in the ownership of the parcel of land even after they established that they were no longer the registered owners of the suit property; that the appellants ought to have applied to review or appealed against the ruling soon after it was delivered; that the application was an abuse of the court process, and that the trial Judge rightly dismissed it.

15. This being a first appeal, this Court's mandate as espoused in the case of *Ng'ati Farmers' Co-operative Society Ltd v Ledidi & 15 others* [2009] KLR 331 is that:

> An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must 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 witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

Whilst

In *Peters v Sunday Post Ltd* [1958] E.A 424 it was held that:

> It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

16. Against these considerations, the main issue for determination is whether the trial Judge was wrong in declining to grant an order for review of its ruling. In addressing this issue, it will be necessary to ascertain whether the application was *res judicata*; whether there was an error on the face of the record; whether there was discovery of new and important information; whether the appellants' exercised due diligence; and whether the application was brought without unreasonable delay.

17. The appellant's application for review was brought under section 80 of the *Civil Procedure Act* and order 45 Rule 1 of the *Civil Procedure Rules, 2010*

    Section 80 provides:

    > 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."
    >
    > Whilst order 45 rule 1 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."

18. In the case of *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another* [2019] eKLR, this Court held that:

> Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 *Civil Procedure Rules*. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay".

19. In the case of *Njaanake v Wamwea* (Civil Appeal E452 of 2022) [2024] KECA 437 (KLR), this Court stated that:

> The grounds upon which a court should review its findings are enunciated in the provisions of Order 45 of the *Civil Procedure Rules, 2010*. These are: discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant 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. The application should be made without unreasonable delay.

20. The appellants' application for review brought under order 45 was founded on two main premises. First, on the discovery of new evidence and, secondly, that there was an error on the face of the record. The first premises was that, at the time of institution of the suit and the subsequent hearing and delivery of the ruling, the respondent did not own the suit property described as Title No Kilifi/Mtondia/77 as pleaded in his Plaint; that by the time of the hearing and delivery of ruling, the new titles in respect of the sub-divided portions of the suit property had already been sold to a third party by the respondent, who had failed to disclose this information to the court; that had that disclosure been made before delivery of the ruling, the court would not have arrived at the decision that it did.

21. In the case of *D. J. Lowe & Company Ltd v Banque Indosuez*, Nairobi Civil Application No 217 of 1998, this Court sounded a caution in such applications and stated that:

> Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

22. In the case of *Rose Kaiza v Angelo Mpanjuiza* [2009] eKLR, this Court cited *Mulla's Commentary on the Indian Civil Procedure Code*, 15th Ed. at page 2726 with approval on the extent and limits of review on account of discovery of new evidence. It was held that:

> Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his

knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.

23. For materials to qualify to be new evidence so as to fall within the realm of order 45 rule 1, it must be evidence that was not within the knowledge of the applicant despite their having exercised the necessary due diligence. See *Opondo v Rift Valley Railways Ltd* (Civil Appeal 5 of 2017) [2023] KECA 170 (KLR).

24. The appellants alleged that the new evidence that they had discovered concerned the extant ownership of the suit property by the time the suit was filed. The respondent has argued that this information was at all times available, and that it could have been obtained by the conduct of a search at the Land Registry at the time of hearing of the suit.

'Due Diligence' is defined by *Black's Law Dictionary* 2nd Edition as:

> Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

25. With the suit having been filed in the year 2000, and the subdivisions having been registered before that in 1999, it becomes evident that this was material that was at all times available, and the appellants not demonstrated that they made any attempts to obtain the proof of ownership or history of title which was openly available at the Lands Registry. Had they done so, they would have established that neither party to the suit was a registered owner of the suit property. Under these circumstances, we agree with the learned judge that having failed to undertake any due diligence to ascertain the ownership of the title of the suit property whilst the suit persisted, it was too late in the day, and there was no basis upon which the court could grant the review orders sought.

26. Second, as to whether there was an error on the face of the record to justify review of the ruling, the appellants contended that, although the court found that the respondent did not legally purchase the suit property from the 1st appellant and had proceeded to dismiss his case, it omitted to order the return of the suit property and title deed to the 1st appellant and that, as a result, the respondent continued to hold onto the suit property which he was found to have unlawfully acquired.

27. In the case of *Nyamogo & Nyamogo v Kogo* [2001] EA 170, the court discussing what constitutes an error on the face of the record, rendered itself thus:

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness 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."

28. The Supreme Court in Uganda in the case of *Edison Kanyabwera v Pastori Tumwebaze*, Supreme Court Civil Appeal No 6 of 2004 held that:

> In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of a fact and includes also error of law."

29. As can be discerned from the above excerpts, a challenge to the substantive decision, such as the assertion that the Judge ought to have made a determination on the ultimate fate of the suit property, cannot be undertaken by way of a review, but rather, by way of an appeal. In seeking to have the trial Judge determine the question of ownership of the suit property, the proper recourse was to have appealed against the decision. In effect, the issue raised could not be construed as an error apparent on the face of the record, and the learned judge was right in so finding.

30. On the delay in bringing this application, the last part of order 45 Rule 1(1) (b) is unequivocal that the application for review of the ruling to the court which passed the decree or made the order should be brought "…without unreasonable delay."

31. The appellants have not addressed the delay in filing the application for review, and neither have they provided any reasons for the delay of 14 years. The delay therefore remained explained. In our view the delay, particularly without an explanation having been provided, was grossly unreasonable. In these circumstances, any orders sought in the face of a delay such as this cannot lie.

32. With regard to the issue of *res judicata*, indeed, the trial Judge made a finding that the application was *res judicata*. However, when the ruling is considered, it is true that it does not state against which case the instant application was *res judicata*, and neither were reasons given for so holding, or the basis on which the decision was arrived at. In the absence of any legal basis upon which we can conclude that the application was *res judicata*, we find that the trial Judge misdirected himself in finding that the application was *res judicata*.

33. All in all, we have come to the conclusion that the appeal substantially fails and is hereby dismissed with costs to the respondent.

    It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA 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