



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 339 OF 2014

BETWEEN

GEORGE M. MUHORO.....APPELLANT

AND

MWALIMU INVESTMENT COMPANY.....1ST RESPONDENT

MALAGAT UNIT FARMERS CO. LTD.....2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Sergon, J.) dated 24th October, 2014 in *H.C.C.C. No. 3568 of 1994*)

JUDGMENT OF WARSAME, JA

This is an appeal against the Ruling of the High Court (**Sergon, J.**) dated 24th October 2014 dismissing the appellant's application for review of the ruling of the High Court, **Ole Keiwua, J.** (as he then was) delivered on 27th June 1997.

A brief background to this appeal is that the **Mwalimu Investment Company Limited** (the 1st respondent) and **Malagat Unit Farmers Company Ltd** (the 2nd respondent), entered into an agreement for the sale of 800 acres of land being a portion of L.R. 2622 which comprised 3900 acres in Laikipia District registered in the 1st respondents' name. Pursuant to the sale agreement the 2nd respondent, paid the 1st respondent a deposit of Kshs. 280,000, which was deposited with the appellant, **George Muriaini Muhoro**, who was a stakeholder and the 1st respondent's advocate.

According to the 2nd respondent, the sale was not concluded and the land was eventually sold by a chargee in exercise of their statutory power of sale.

Despite several demands, the appellant and the 1st respondent failed to refund the deposit. Consequently, the 2nd respondent filed a suit on 5th October 1994 seeking a refund of Kshs.280,000 with interest.

Vide an application dated 21st February 1997, the 2nd respondent sought orders for the filed joint defence to be struck out and for judgment to be entered in its favour as prayed in the plaint. The application was opposed by grounds of opposition dated 6th March 1997 but in a ruling delivered on 27th June, 1997, the trial court found that the defence filed by the appellant and the 1st respondent was frivolous and vexatious and proceeded to strike it out and enter judgment in favour of the 2nd respondent in the sum of Kshs.280,000 with interest and costs of the suit.

More than a decade later, the appellant received a notice to show cause why execution should not be granted to the decree holder for the sum of Kshs. 1,496,981.85. Subsequently, the Deputy Registrar, Honourable **A.K Ndungu**, issued execution orders against him on 5th June, 2010. The appellant then moved the High Court under certificate of urgency and by an application dated 21st June 2012, sought to review the decision of the trial court and to stay the impending execution. The appellant also filed a preliminary objection similarly dated, stating that the decree was bad in law as it offended **Section 4(4)** of the

Limitation of Actions Act.

In the application, the appellant asserted that he had traced new evidence detailing instructions he received from the 2nd respondent's advocate to deposit Kshs.1,000,000 with Continental Credit Finance Limited (in liquidation). In the supporting affidavit dated 21st June 2012, it was deposed that at the time the suit was filed, the appellant did not have the advantage of the documents in his possession. He

further deposed that the parties ought to have been cross-examined to determine the matter on merit. In dismissing the application for review, the learned judge held as follows:-

“Although the 2nd defendant alleges that he did not have the relevant documents at the time of filing the suit, he has failed to give a reason why he could not obtain them at the time and how he now has the said documents. The 2nd defendant has not also shown any mistake or error apparent on the face of the judgment he seeks to have reviewed. Finally, the 2nd defendant has failed to explain his delay in filing this application.”

The 2nd defendant’s main gravamen and reason for alleging that the suit was not determined on merit, is because it was decided summarily. It is noteworthy the 2nd defendant participated in the application dismissing his defence. It was therefore heard and determined on merit. The 2nd defendant should have sought recourse in the appellate court in the event he felt the suit was not heard on merit. The 2nd defendant has not satisfied the requirements of order 45 that he has a basis for review of judgment. Accordingly, the application is dismissed with costs to the plaintiff.”

Dissatisfied with the ruling, the appellant lodged the instant appeal citing a total of 9 grounds which in summary, fault the learned Judge for:-

- i. Failing to determine the validity of the unsigned and undated judgment.
- ii. Failing to determine that the sum sought in the suit by the 2nd respondent was held by their advocates.
- iii. Failing to determine the issue of limitation of Actions Act Cap 2 Laws of Kenya.

At the hearing, learned counsel, **Mr. Osoro** appeared for the appellant while learned counsel, **Mr. Gichuru** appeared for the 2nd respondent. Counsel relied entirely on the written submissions filed on behalf of the parties.

The appellant submitted that the legal principles warranting summary judgment were not applied by the High Court and that cross examination of the parties was necessary to determine the suit on its merits. The appellant further argued that the judgment delivered by **Ole Keiwua, JA** (as he then was) was incompetent as it was neither signed nor dated.

The learned Judge was faulted for failing to take into consideration the new evidence placed before him that indicated that the 2nd respondent’s advocate had instructed the appellant to deposit a sum of Kshs.1,000,000 which included Kshs.280,000 sought in the suit. According to the appellant, the deposit of Kshs.1,000,000 lifted his obligation as stakeholder and that the 2nd respondent’s failure to execute for twelve years entitled him to reasonably assume that the matter was resolved. Lastly, the appellant urged the court to set aside the invalid judgment and allow the parties to be heard on merit.

On its part, the 2nd respondent submitted that the learned Judge’s decision which was discretionary in nature was sound and abided by the guiding principles for review of a judgment or order. Counsel argued that the appellant through its application for review was attempting to introduce new issues which were not part of its defence in the trial court and which the 2nd respondent did not have a chance to rebut. It was further argued that the allegations of the undated/unsigned judgment and the deposit of Kshs.1,000,000 to a joint account only arose after judgment had been entered and costs had been taxed by consent. Citing the case **Civil Appeal No. 219 of 2013, Nairobi Independent Electoral and boundaries Commission & Another vs. Stephen Mutinda Mule & Others [2014] eKLR** counsel reiterated that parties are bound by their pleadings and any evidence which is at variance with the averments of the pleadings goes to no issue and should be disregarded.

Be that as it may, counsel contended that since the original file was misplaced, any errors or omissions, if any, were sanitized by the decree which agreed with the judgment and bore the date of the day judgment was delivered. As to whether the execution of the decree was barred by virtue of **Section 4(4) of the Limitation of Actions Act**, it was submitted that the Notice to Show

Cause was filed 11 years, 11 months and 28 days after delivery of judgment which was within the limit envisaged by the law. Furthermore, reliance was placed on **Order 51, rule 12 of the Civil Procedure Rules** which provides that

“All applications or other process shall be deemed to have been made when filed in court.”

I have considered the record, rival submissions by counsel and the law. An application for review essentially involves the exercise of the Judge’s discretion. Therefore, before this Court can interfere with the learned Judge’s discretion in declining to review the judgment, I must be satisfied that the principles outlined in **Mbogo & Another vs. Shah [1968] EA 93** are met. In a nutshell, that the Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account a relevant matter.

The parameters within which a court exercises its discretion in an application for review are succinctly spelt out under **Order 45 of the Civil Procedure Rules**. In this case the appellant’s application for review was anchored on the discovery of “a new and important matter or evidence which after the exercise of due diligence was not within his knowledge, and could not be produced at the trial”.

My perusal of the appellant’s application dated 21st June, 2012 and supporting affidavit similarly dated, the 2nd respondent’s Replying Affidavit dated 18th October 2012, the appellant’s Supplementary Affidavit dated 24th October 2012 and the annexures thereto clearly indicate that the issues canvassed before the High Court revolved around the appellant’s discovery of evidence that he had already paid the money sought and therefore was not liable. The issue regarding the undated and unsigned judgment was only raised by the appellant in his submissions dated 26th February 2014 and was never placed or canvassed before the High Court for determination. It was therefore not the subject of the evidence.

The jurisdiction of an appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is exactly what the appellant has sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the validity of the judgment. This ground cannot stand.

Concurring with the above position, this Court in *Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR* stated:-

“The appellant cannot be allowed to hang on a defence that it never raised and prosecuted in the High Court in this present appeal. Not only does this Court lack the benefit of the reasoning of the High Court but the new defense should be taken as an afterthought on the appellant’s part and allowing it would be prejudicial to the respondent.”

With regard to the second issue of discovery of new evidence, the appellant argued that he had discovered new facts since the judgment in the trial court was delivered, that showed that the 2nd respondent received the sum of Kshs. 1,000,000 (which included Kshs.280,000 sought in the plaint) through their advocate, who requested that Kshs.1,000,000 held by the appellant on behalf of the 2nd respondent, be transferred to Continental Credit Finance Limited for the purpose of the 2nd respondent acquiring a loan.

A perusal of the annexed bundle of correspondences marked as “GMMA” in the appellant’s affidavit in support of his application clearly indicate that some of the letters adduced were directly addressed to him. These include the letters dated 10th September 1985, 13th August 1985, 5th August 1995 and 22nd July 1985. One can only logically conclude that these letters were well within his possession before the suit was filed in the year 1994 and that their contents well known to him. Moreover, the letters which were not directly addressed to him, were carbon copied to him or his client (the 1st respondent). These include the letters dated 10th September 1985 and 20th May 1985. Lastly, he authored the letter dated 2nd August 1985.

I cannot, therefore by any stretch of imagination say that the appellant had discovered new and important matter which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the suit was filed. No evidence was presented to the High Court to show why the attached evidence could not be produced before the defence was struck out, or circumstances that might have prevented him from making a timely presentation of the alleged new evidence despite his best effort or that he had no knowledge that such evidence existed. I therefore agree with the learned Judge that the ground raised by the appellant in support of his application was not within the scope of **Order 45 rule 1** of the **Civil Procedure Rules**.

I also agree with the sentiments of the learned Judge that “the 2nd defendant should have sought recourse in the event he felt the suit was not heard on merit”. Several issues raised by the appellant such as the need for the trial court to have cross examined the parties so as to determine the matter on merit seem to us to be the province of the Appellate Court. The power of review is a very restricted power and is not to be confused with appellate powers which may enable an appellate Court to correct all manner of errors committed by the superior Court.

The last issue which I would like to address concerns wrong exercise of the High Court’s discretionary power by the failing to determine whether the execution of the decree was barred under **Section 4 (4) of Limitation of Actions Act Cap 2 Laws of Kenya**. This issue was raised by the appellant after execution orders were issued against him by the Honourable Deputy Registrar, by way of a Preliminary Objection dated 21st June 2012, in the High Court. A perusal of the proceedings before **Justice Sergon** clearly shows that the learned Judge’s ruling was only limited to the notice of motion dated 21.6.2012. It is apparent that the question on limitation of time is still pending for determination before the High Court and it would be premature for me to make a determination on that issue in those circumstances.

In the end, having carefully considered this appeal, I am not persuaded that the learned Judge committed any error to warrant my interference with his judgment. In the circumstance I dismiss the appeal with costs to the 2nd respondent.

This Judgment is delivered pursuant to **Rule 32 (3) of the Court of Appeal Rules** since Odek, JA passed on before the delivery of the Judgment. As Kiage, JA concurs, orders accordingly.

Dated and delivered at Nairobi this 21st day of February, 2019.

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, J.A

I fully concur with the Judgment of my learned brother Warsame, J.A, which I had the benefit of perusing in draft, and have nothing useful to add.

Dated and delivered at Nairobi this 21st day of February, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR