IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 38 OF 2016

BETWEEN

SAMSON NGUGI ICHUNGWA T/A GRENAIR.....APPELLANT

AND

NATIONAL INDUSTRIAL CREDIT BANK.....1ST RESPONDENT

RAJU DHANANI.....2ND RESPONDENT

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....3RD RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya

at Nairobi, (Ogola, J.) dated 31st July, 2015

in

H.C.C.C. No. 86 of 2010)

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JUDGMENT OF THE COURT

This interlocutory appeal emanates from a ruling dated 31st July 2015. The ruling was in respect of three different applications made variously by the parties in the suit leading to this appeal. The three applications were subsequently consolidated and heard together. The subject matter in the suit was the parcels of land known as **Kikuyu/Kikuyu Block 1/48** and **Kikuyu/Kikuyu Block 1/55** "*the suit properties*" which had been charged to **National Industrial Credit Bank** "*the 1st respondent*" by **Samson Ngugi Ichungwa T/A Grenair**, *"the appellant"*. Apparently, the appellant was unable to service the loan and through Joseph Gikonyo T/A Garam Investments, *"the 3rd respondent"*, the 1st respondent exercised its statutory power of sale, sold and transferred the suit property to Raju Dhanani "*the 2nd respondent*".

In the first application, the appellant sought to review, vary or otherwise set aside the ruling and orders made in favour of the 2nd respondent on 26th June, 2014. The ruling in favour of the 2nd respondent followed an application by the said respondent in which he sought interlocutory judgment in respect of a counter-claim to the suit filed by the appellant. The suit had been initiated by the appellant and was later amended with leave of court culminating in an amended plaint dated 14th November 2013. The 1st and the 3rd respondent filed an amended defence to the suit on 29th November 2013 while the 2nd respondent filed the amended defence together with a counter-claim on 2nd December 2013. The appellant filed a reply to the respondents' defences and a counter-claim on 18th March 2014 and served them on the respondents on 21st March 2014. It is around this time that the appellant claims his advocate discovered that an interlocutory judgment had been entered in favour of the 2nd respondent on 4th February 2014 in respect of the counter-claim filed by him. The appellant was of the view that the counter-claim raised or sought to determine issues to do with the proprietary rights of the suit property which were also in contention in the original suit. On that premise, he filed an application on 10th April 2014 seeking to set aside the interlocutory judgment but the application was unsuccessful and was dismissed with costs. The appellant subsequently filed an application for review of the aforesaid order of dismissal. In the application, the appellant faulted the High Court judge of failing to take into account that the counter-claim raised issues similar to those raised in the main suit, which in his view, was sufficient reason for the ruling and order to be reviewed. The application as expected was opposed by the 1st and 3rd respondents on the basis that it failed to meet the strictures of an application for review. Specifically,

that the application was not based on the discovery of new and important matter that was not within the appellant's knowledge and that there was no error apparent on the face of the record to warrant a review. There was also the contention that the application had been made after an unduly long and unreasonable delay of nine months and which delay had not been explained.

In his ruling, the learned Judge remarked that whether or not to set aside a judgment is a discretionary exercise by the trial court which is unfettered but which has to be exercised upon judicious grounds. The court found that the Judge in determining the application had not deviated from the applicable principles or that he exercised his discretion wrongly or unjustly so as to warrant the discretionary orders of review in the appellant's favour. The Judge went further to state that in any case, even if it turned out that the Judge had wrongly applied the setting aside principles or that he failed to exercise discretion fairly or justly, then those would be grounds for appeal and not for review. According to the Judge, the contention that the interlocutory judgment was irregular was addressed and resolved and in the event that the appellant was not satisfied then the same would still be a ground for appeal rather than a premise for a review application. With those sentiments, the Judge dismissed the appellant's application for review.

The second application was taken out by the 2nd respondent and was dated 11th December 2014. The application sought principally security for costs in favour of the 2nd respondent. The application also sought in the alternative that the monthly rental income accruing from the suit properties be deposited in a joint interest earning account by the appellant and the 2nd respondent's respective advocates. The facts informing the application as brought out by the 2nd respondent were that he had purchased the suit properties at a public auction. He claimed that he paid the full purchase price at the auction conducted by the 3rd respondent on the instructions of the 1st respondent who was exercising its statutory power of sale after the appellant defaulted in the repayment of the loan.

The 2nd respondent as it were, had obtained a loan facility of Kshs. 20 million from a local bank to purchase the suit properties. He claimed that he had intended to use the rental income from the suit properties to service the loan. Since the appellant was in the possession of the suit properties from which he continued to collect rental income, the 2nd respondent was apprehensive that he would be incapable of refunding the rental income collected in the event his counter-claim succeeded. In the circumstances, he prayed for security for costs and *mesne* profits pending the hearing and disposal of the suit. The application was opposed by the appellant on the basis that the 2nd respondent had previously filed several applications seeking eviction orders and distress for rent all of which had been dismissed by court. In the appellant's view, granting the 2nd respondent the prayer sought would be tantamount to the court sitting on appeal of its own decision, having previously dismissed the 2nd respondent's application for distress for rent. The appellant in the circumstances urged the Court to determine that the issue was *res judicata*.

In his now impugned ruling, the Judge held that the application of security of costs was in no way similar to the previous application by the 2nd respondent seeking distress for rent and was therefore not *res judicata*. Putting matters into context or perspective the court found that the 2nd respondent had already obtained an interlocutory judgment in his favour on the counterclaim. Attempts to set aside the same had been dismissed. Pursuant to the interlocutory judgment, the 2nd respondent had obtained the orders granting him vacant possession of the suit properties, special damages of loss of income and *mesne* profits. As such, the judge took the view that the 2nd respondent ought to have enforced the interlocutory judgment instead of making an application for security for costs. The court also held that the judgment had compromised or settled the appellant's prayer in his suit which was to the effect that the 2nd respondent was not entitled to the rental income and which the Judge found was the only prayer against the 2nd respondent with the rest of the prayers directed at the 1st and 3rd respondents. The learned Judge therefore reasoned that there was no need for the 2nd respondent to pursue the application for security of costs.

The third application was made by the 1st and 3rd respondents seeking to have the suit against them marked as spent and costs for the suit. Their case was that the appellant had previously instituted two suits to wit, **HCCC No. 592 of 2008** and **HCCC No. 287 of 2009** both geared towards obtaining orders to stop the 1st respondent from exercising its statutory power of sale over the suit properties. The respondents stated that all the applications seeking to stop the exercise were unsuccessful leading to the public auction conducted on 9th February 2010 with the 2nd respondent emerging the top bidder. Subsequently, the suit properties were transferred and registered in the 2nd respondent's name and was issued with a Certificate of Lease issued on 1st December 2010. Following the turn of events, the appellant made an application dated 8th December 2010 in the present suit seeking that the 2nd respondent be restrained from evicting him from the suit properties and or transferring or alienating the properties. The application was unsuccessful but the appellant filed an amended plaint which the 1st and 3rd respondents in their application allege relate to matters that have already been conclusively determined in the previous two suits. The rulings in the two suits had conclusively found that the 1st respondent was entitled to sell the suit properties and that the properties had been validly sold at the auction. Conclusive because the said orders remain in force and have never been appealed against or set aside.

In the circumstances, the respondents were of the view that the present suit was spent and or *res judicata* since it did not raise any issues that had not been heard and determined by the High Court. The respondents urged that the court had already determined that the appellant's proprietary rights over the suit properties had been extinguished and that the 2nd respondent was the bona fide owner and thus rendering the prayers as contained in the amended plaint spent. Wishing not to be dragged along in matters already conclusively determined, they asked the court to mark the suit as spent or overtaken by events. The appellant denied the 1st and 3rd respondents' claims and maintained that the present suit contained additional issues to the other suits between the parties.

In his ruling the Judge found that the issues raised in the present suit were *res judicata* and had indeed been spent or overtaken by events after being conclusively determined. The appellant did not appeal the earlier determinations and so the orders remained in force and binding. The learned Judge on that basis proceeded to allow the 1st and 3rd respondents' applications.

Dissatisfied by the ruling and those orders of the court, the appellant instituted the instant appeal. The appellant later filed a Notice of Motion dated 20th May 2016, invoking **rule 5 (2) (b)** of this Court's rules seeking to stay further proceedings and/or execution of the aforesaid orders by the 2nd respondent pending the hearing and determination of the appeal. Counsel for the appellant and the 1st respondent agreed that the appeal which had been filed and the application be heard together and consequently this Court on 26th July 2018 ordered that the proceedings

in the High Court await the outcome of the hearing and determination of the application and the appeal. The Court also dispensed with the participation of the 1st and 3rd respondents in light of the ruling by the High Court that the cases against them had been overtaken by events. Before the appeal could be heard, however, the appellant filed an application dated 24th October 2018 praying that this Court reviews or varies its orders made on 26th July 2018 and allow the participation of the 1st and 3rd respondents in the appeal. The main ground for seeking the review was that the instant appeal affected those parties going by the grounds of appeal. As such, the appellant contended that if the appeal was to proceed without the said respondents, then he would be exposed to enormous loss/liabilities and damages in the event the appeal succeeded. The 2nd respondent opposed the variation of the order on the basis that on three occasions and by rulings dated 31st July 2015, 27th January 2017 and on 26th July 2018 respectively, the appellant's case was adjudged as spent having been overtaken by events.

When the appeal came up for hearing, the Court allowed the appellant's review application and in effect the participation of the 1st and 3rd respondents in the appeal was restored. **Mr. Mirie, l**earned counsel for the appellant submitted that he was challenging the interlocutory judgment entered in favour of the 2nd respondent. According to counsel, the sale and transfer of the suit properties did not extinguish the rights of a chargor to redeem his property. That where fraud in respect of the sale and transfer had been demonstrated then the court had power to set aside the sale irrespective of whether the property had been transferred to another party or not. Counsel submitted that issues imputing fraud had been pleaded in the suit pending in the High Court. In urging the grounds of appeal, counsel faulted the Judge for his finding that a chargor's right after sale were extinguished and his recourse lie in a claim for damages. Counsel argued that making such a finding in an interlocutory application had the wrong effect of summarily dismissing his case and in essence without him being accorded a hearing and that the judge failed to appreciate that an interlocutory judgment could be set aside.

Learned counsel for the 1st respondent **Mr. Walubengo** submitted that he wished to rely on the grounds filed affirming the High Court's ruling. In the said grounds he pointed out that the learned Judge made no error in determining the proprietary rights in regard to the suit properties. That attempts to have the interlocutory judgment set aside on grounds that the Judge had determined an issue raised in the original suit had been dismissed by the trial court. Further, that the trial court had on two occasions ruled that the suit properties had been validly sold by the 3rd respondent on behalf of the 1st respondent in the public auction conducted on 9th February 2019 in the proper exercise of the 1st respondent's statutory power of sale. Further that the trial court justly and judiciously exercised its discretion in dismissing the appellant's application for review and there was no basis upon which this Court could interfere since the decision was not capricious or without foundation. The respondent also contended that the instant appeal did not raise any proper and defensible grounds of appeal and considered it as another attempt by the appellant to deny the 2nd respondent's right to the enjoyment of the suit properties.

Miss Karanja, learned counsel for the 1st and 3rd respondents associated herself with the submissions of the 2nd respondent. Counsel submitted further that it had not been demonstrated that the trial judge erred in reaching the conclusions that he did. Counsel explained that the interlocutory judgment had been entered against the appellant because the appellant failed to enter a defence in regard to the counter-claim. Further that the appellant had filed three suits before the High Court and so the issues between the parties had been conclusively determined.

Having considered the grounds of appeal, the parties' respective submissions, in our view the instant appeal can be determined on the following issues; whether the trial judge erred in dismissing the appellant's application seeking review of the interlocutory judgment entered on 14th February 2014; the appellants suit is spent, and or overtaken by events; and the trial court exercised its discretion judiciously.

As stated, this interlocutory appeal is in regard to three applications filed in the suit and decided on diverse dates. The first application invoked order 45 rule I of the Civil Procedure rules seeking a review of a ruling and orders granted in favour of the 2nd respondent. The 2nd respondent had further to his defence in regard to the suit therein filed a counter-claim. When the appellant failed to enter defence to the counter-claim, the 2nd respondent successfully obtained an interlocutory judgment on 14th February 2014. The appellant then applied to set aside the interlocutory judgment albeit unsuccessfully. Instead of lodging an appeal against that refusal, the appellant sought a review under Order 45 of the Civil Procedure Rules. The gist of his application was that the court failed to consider that the issues raised in the counter-claim regarding proprietary rights in the suit property had also been raised in the original suit. Before this Court, the appellant has contended that the interlocutory judgment had the effect of conclusively determining the issues raised in the suit which denied him a hearing. In deciding the review application, the Judge had to be satisfied that that the requirements for a successful review application had been met. The application for review was opposed on the basis that the appellant failed to demonstrate the requirements of review set out in order 45 rule 1 of the Civil Procedure Rules, to wit: -

> **"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 review of judgment to the court which passed the decree or made the order without unreasonable delay".**

The trial judge agreed with the other parties' submissions that the appellant failed to meet the above threshold. The appellant has before us reiterated and seeks to impugn the Judge's finding still on the premise that the prayers sought were similar to those sought in his Amended Plaint. To contextualize, the appellant is challenging the Judge's discretion. It is not in dispute that a review application calls for exercise of discretion and the same is unfettered with the overriding edict being that such discretion is exercised upon the set guidelines. For an appellate court to interfere with such exercise of discretion, the Supreme Court relying on the often cited case of **Mbogo & Another v Shah [1968] EA 93** in **Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR** stated as follows,

> **"…we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise**

of discretion as follows:

(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.

(ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

(iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

(iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

(v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

(a) as a result, a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice." [Emphasis added**]**

We reiterate that the appellant has before us maintained the assertions he made before the High Court, that in refusing to set aside the interlocutory judgment, and indeed the review application, the learned Judge failed to consider that the issues raised in the counter-claim were similar to those in the main suit. As stated by the Supreme Court, an application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his application. That argument was made before the judge and was duly considered. It is also not a reason to warrant review of an order under Order 45. The appellant has also contended that issues concerning proprietary rights ought not to be determined through interlocutory judgment. He has further claimed that the interlocutory judgment had the effect of denying him a hearing. According to him, those reasons ought to satisfy the requirements of review since they would constitute other sufficient reasons warranting review.

It is necessary in our view to revisit the circumstances under which the 2nd respondent obtained the interlocutory judgment. In response to the appellant's suit, the 2nd respondent raised a counter-claim praying for a declaration that the appellant had no proprietary interest in the suit properties on the basis that he had been issued with a Certificate of Lease after purchase of the suit properties via auction.; vacant possession and in default eviction of the appellant, *mesne* profits and special damages. Contrary to what was stated by counsel for the 2nd respondent during the hearing, the appellant did enter his reply and defence to the counterclaim. Those pleadings were however successfully opposed by the 2nd respondent on the basis that they were filed out of time and without leave of court. Without any opposition to the counter-claim, the 2nd respondent's counter-claim was left undefended and or unopposed and thus succeeded. In the circumstances, the argument that proprietary rights over property ought not to be determined through interlocutory judgment becomes untenable and would not constitute 'other sufficient reason' for purposes of review.

On the other hand, wrong exercise of discretion is not a basis for a review. The Judge correctly observed that even if the trial judge wrongly exercised his discretion in determining the application to set aside the interlocutory judgement, then the same would be a ground for an appeal and not review. In **Origo & Another v Mungala (2005) 2 KLR** it was held that,

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end."

It has often been stated that a good ground for appeal may not necessarily be a good ground for review. On this basis, the appeal on the application dated 16th March 2015 ought to fail. The appellant has failed to satisfactorily demonstrate that the trial court misdirected itself in the exercise of discretion.

This interlocutory appeal is basically an attempt by the appellant to salvage his suit that is pending before the High Court. This appeal directly impacts on the suit in the sense that, in deciding whether or not the trial court exercised its discretion judiciously in its determination of the three applications, the trial court determined whether the suit had been indeed overtaken by events and therefore spent and res judicata. The appellant instituted HCCC No. 86 of 2010 praying for the following orders;

"a. An order of injunction restraining the Defendants whether by themselves or their servants and/or agents , or Advocate or auctioneers or any other person acting through them or otherwise from doing the following acts or any one of them that is too say from interfering with the right of possession, advertising for sale, disposing or selling by public auction or otherwise howsoever at any other time or by the Plaintiff's ownership of the title to and interest in ALL THAT parcel of land known as Kikuyu/Kikuyu Block 1/48 and Kikuyu/kikuyu Block 1/55;

b. a declaration that the Charge dated 6th August 2007 is null and void of no effect and not binding on or enforceable as against the plaintiff and that the Plaintiff is discharged from the said Charge and from all or any liability thereunder;

c. A declaration that the purported sale of the Plaintiff's properties known as Kikuyu/Kikuyu Block 1/55 by the 3rd Defendant on 9th February 2010 or any other date thereafter is null and void ab initio and if the said properties have been transferred to the 3nd Defendant or any other parties, the said transfers be cancelled forthwith and the said properties do revert to the Plaintiff;

d. Costs of the suit together with interest thereon;

e. A declaration that registration of the suit properties in the favour of the 3nd Defendant on 29th November 2010 and the Certificate of Lease dated 1st December 2010 and are hereby nullified.

f. A declaration that the 2nd Defendant is not entitled to rent for the Plaintiff's occupation of the suit premises through the hearing and determination of this case."

As stated, the appellant had charged the suit properties to the 1st respondent as security for monies advanced. When the 1st respondent sought to exercise its right of statutory sale, the appellant challenged that right by filing suits. One such suit was **Civil Case 287 of 2009** in which the appellant challenged the 1st respondent's powers to sell the charged properties contending that the 1st respondent had undervalued the suit properties for purposes of sale or that it failed to take into consideration his plea to have the repayment of the loan rescheduled. Ultimately, The High Court (**Kimaru, J**) ruled as follows on an application seeking a temporary injunction to stop the sale of the properties,

> "**The undisputed facts of this application are that the plaintiff borrowed money from the defendant; secured the same by charging the suit properties; defaulted in repaying the said loan; failed to redeem the properties when he was issued with a valid statutory notice; and, has so far made no effort to repay the outstanding amount together with the accrued interest. I hold that the defendant cannot be denied its statutory right to redeem the suit properties. In the event that the defendant fails to discharge the obligation placed on it to secure the best possible price for the suit properties during the sale by public auction, damages will be an adequate remedy for the plaintiff as provided under Section 77 (3) of the Registered Land Act. The balance of convenience tilts in favour of the defendant which is being kept out of its money**."

The ruling was never varied, set aside or an appeal lodged against it. Similarly, the ruling of **Koome. J**. had determined that the suit properties were validly sold in the public auction conducted on 9th February 2010. The finding was never again, varied, set aside on appeal. Upon that basis, the prayers sought in the suit pending before the High Court are really spent. The rights of the 1st respondent to exercise its power of sale having been upheld and the ruling that the suit properties were legally sold and transferred remain unchallenged, making the prayers sought in the suit spent or overtaken by events as correctly held by the learned Judge. The same issues are also *res judicata.* The doctrine of *res judicata* would apply in this case since the doctrine not only acts as a bar or estoppel to subsequent litigation not only on issues that were directly in issue between same parties but to any other issues that ought to have been raised. The rationale of the doctrine was discussed in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** as follows,

> "**The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny."** [Emphasis added]

Marking the suit as spent further means that the basis of the applications herein is lacking and this appeal remains unsupported and untenable.

The upshot is that this appeal ought to be dismissed with costs to the respondents for want of merit. It is so ordered.

Dated and delivered at Nairobi this 5th day of July, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR