IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & KANTAI, JJ.A)

CIVIL APPEAL NO. 237 OF 2018

BETWEEN

FREDRICK MWANIKI MUSAU.....APPELLANT

AND

JOSEPH MUTHIANI KIVINDU.....1ST RESPONDENT

WAYUA KIVINDU.....2ND RESPONDENT

(Being an appeal against the Ruling and Order of the High Court of

Kenya at Machakos (Angote, J.) delivered 11th May, 2018 **in E.L.C. No. 97 of 2015)**

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JUDGMENT OF THE COURT

The appellant in this appeal **Fredrick Mwaniki Musau,** is the 1st defendant in **Environment and Land Court Case No. 97 of 2015** filed at the High Court of Kenya at Machakos. The 1st respondent, **Joseph Muthiani Kivindu,** is the son of the 2nd respondent, **Wayua Kivindu,** who are the plaintiffs in that suit. That suit has not been heard or determined and it is pending before that court for hearing. It is prayed in that suit through an amended plaint dated 9th November, 2015 that injunction and prohibitory orders be issued against the appellant and other parties prohibiting them from laying claim, alienating, transferring or interfering with suit premises known as **L.R. No. 8914/43 Ngelani Ranching Unity, Athi River ("the suit premises")**. It is also prayed that a declaration be issued that the respondents are the legal and/or beneficial owners of the suit premises and are entitled to be registered and issued with title documents of title and further that a cancellation and rectification of any title or rights transferred to the appellant or his agents, buyers or any person whomsoever be cancelled and the court issues other appropriate reliefs in the circumstances.

The appellant and other parties to that suit filed a defence.

There are many applications filed at the High Court but we will not attempt to speak to them because they are not relevant to the matters raised in this appeal. What is relevant were orders that were issued by the High Court against the appellant on 11th May, 2018.

Upon application by the respondents on 23rd March, 2015 the High Court issued an order to the effect that *status quo* in respect of the suit premises obtaining as of 23rd day of March 2015 be maintained. The order was later extended by the court. There is on record an Affidavit of Service by a Court Process Server **Zachary Nyende Osiolo** who deponed that on 25th March, 2015 he served upon the appellant pleadings in the High Court suit, Summons to Enter Appearance, the application leading to the orders we have referred to, the order itself, amongst other documents. Upon being served the appellant appointed a lawyer who entered an appearance on his behalf and filed a defence.

There is on record a sale agreement entered between the appellant and Kenya Union of Savings and Credit Co-operatives Limited (KUSCCO) and by a transfer made on 15th April, 2016 the appellant transferred the suit premises to KUSCCO (KUSCCO was thereafter made an interested party to the suit). That action by the appellant led to an application being made by the respondents on 14th September, 2016. It was prayed amongst other things in the motion that conservatory orders or orders of status quo be issued against KUSCCO stopping it from alienating or dealing with the suit premises. It was further prayed that KUSCCO be enjoined to the suit and that the appellant be committed to civil jail for a period of upto six months or be fined a sum of Shs.27,000,000 and his properties be attached for contempt of court for disobeying the orders that had been issued on 23rd March, 2015 preserving the suit premises. There were other prayers in the Motion but they are not relevant to this appeal. It was stated in grounds in support of the Motion and in an affidavit of the 2nd respondent that the court had issued interim orders preserving status quo; that the appellant had been served with court order but that as the matter was

still pending in court the appellant had sold the property to KUSCCO for Shs.27,000,000. It was further stated that KUSCCO had since taken possession of the suit premises and had commenced survey and sub-division of the same.

That motion was opposed by the appellant and KUSCCO but in a ruling delivered by Angote, J. on 3rd March, 2017 the judge found that the appellant had been duly served with the court order, was in contempt of the court order and after a mitigation was taken the appellant was ordered to pay a fine of Shs.2,000,000 in default to serve a sentence in jail for 30 days. KUSCCO was enjoined to the suit as the 4th defendant. The appellant paid the fine imposed the same day 3rd March, 2017.

On 7th November, 2017 the appellant filed a motion at that court where it was prayed that the court be pleased to review part of the ruling and order made on 3rd March, 2017 sentencing the appellant to pay a fine of Shs.2,000,000 for contempt of court. It was further prayed that the court order a refund and restitution to the appellant of the amount paid that exceeded the maximum limit set in law.

In the grounds in support of the motion and in a supporting affidavit of the appellant it was stated that there was an error apparent on the face of the record; that the maximum legally permissible penalty for contempt of court was Shs.200,000; that the excess fine levied against the appellant could only be an error on the part of the court which the court had jurisdiction to correct; that estoppel could not be available against an express provision of the law; and that the judge in meting out the sentence had inadvertently overlooked an express mandatory legal provision.

That application was opposed and in a ruling delivered on 11th March, 2018 the judge found that the he had no jurisdiction to review finding that the appellant should appeal against the findings. That is the background that provoked this appeal.

There are seven grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by his advocates **Odero-Olonde & Company Advocates.** The appellant says that the judge erred in law by failing to find that there was an error apparent on the face of the record and further failing to review the error; that the judge failed to appreciate that the time for appealing had long lapsed and the judge should have exercised review jurisdiction; that the judge erred in law by failing to find that he had jurisdiction under both **Order 45** of the **Civil Procedure Rules** and **Section 32(1)** of the **Contempt of Court Act, 2016** to review the fine imposed upon the appellant; that the learned judge abdicated a duty and failed to exercise powers vested on him by law; that the judge erred in failing to find that the appellant was entitled to a refund and/or a restitution for monies paid in excess of the maximum prescribed; and finally that the judge erred in law and fact by failing to find that estoppel could not apply where there was an express provision of the law and that the appellant could not have been assumed to have waived the right to claim a refund. We are therefore asked to allow the appeal and review the sentence passed by the High Court.

When the appeal came up for hearing before us on 3rd June, 2019 both learned counsel Odera-Olonde for the appellant and **Ms. Apolot** for the respondent relied entirely on written submissions which had been filed for the parties.

The appellant in written submissions faults the learned judge for imposing a fine of Shs.2,000,000 in default to serve custodial sentence of 30 days when according to counsel the law did not allow it. Counsel cites **section 28** of the **Contempt of Court Act No. 46 of 2016** and submits that the judge had no legal authority for imposing that sentence. Counsel faults the judge for refusing the application for review when according to counsel the judge had legal authority to review it.

Mr. Olonde finally cites the famous case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" v CALTEX OIL (KENYA) LIMITED [1989] KLR 1** for the proposition that since jurisdiction is everything what the judge did was a nullity.

The respondent in opposing the appeal in the said written submissions submit that the ruling which was delivered on 3rd March, 2017 came after the enactment of the Contempt of Court Act which came into force on 13th January, 2017. According to counsel there was no error in the ruling and therefore the judge was right to refuse to exercise the review jurisdiction. In further submissions, the respondents say that failure to apply the law correctly cannot be a basis for review but would be a ground of appeal and cite the case of **PACREAS T. SWAI v KENYA BREWERIES LIMITED [2014] eKLR** for that proposition. The respondents while agreeing that the ruling came after the Contempt of Court Act came into force submit that the said Act could not apply retrospectively in respect of contempt committed before the commencement of the Act.

We have considered the record of appeal and the submissions made. The Contempt of Court Act No. 46 of 2016, which had since been declared unconstitutional, commenced on 13th January, 2017. **Section 28** of the Act provided as follows:

> ***"28(1) Save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both ...."***

It is therefore clear from a casual reading of this provision that a person who commits contempt of court is liable under the Contempt of Court Act which came into force on 13th January, 2017 upon conviction to a fine of Shs.200,000 or imprisonment for a period of six months or to both.

The record before us shows that the orders of the High Court were issued on 23rd March, 2015 way before the Contempt of Court Act came into force. Although the ruling leading to the imposition of the payment of a fine or a term of imprisonment was delivered on 3rd March, 2017 the judge could not have dealt with the matter under the Contempt of Court Act No. 46 of 2016 because the orders had been granted before that Act came into force and the Act could have retrospective effect. We do not therefore agree with learned counsel for the appellant that the judge should have imposed a fine of Shs.200,000 or six months imprisonment as provided in the Contempt of Court Act. That Act was not in force in 2015 and the appellant who was found guilty of Contempt of Court could only be dealt with under the law prevailing when the order was made. Contempt of Court pre the period before the Contempt of Court Act of 2016 was governed by **section 5** of the **Judicature Act Chapter 8 Laws of Kenya.** By **section 5** thereof the High Court and this Court have the same power to punish for contempt

of court as was for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts. It is provided under that provision of law that an order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary orginal criminal jurisdiction of the High Court. Therefore the position is that the judge was entitled in the matter leading to this appeal to deal with the application for contempt in accordance with the Judicature Act. The procedure for applications in relating to contempt of court in England is set out in the **Contempt of Court Act 1981 (1981 Chapter 49)** and the **Civil Procedure (Amendment No. 2) Rules, 2012.**

In England an inferior court has jurisdiction at common law to deal only with contempt committed in the **"face of the court".** On the other hand a superior court of record has jurisdiction to deal summarily with any contempt affecting its own proceedings. Superior courts of record have power to punish for contempt of court of their own motion for contempt in the face of the court; for disobedience of a court order and for breaches of undertakings of the court. The judge may act to sentence for contempt where it is necessary to act quickly. However, if not urgent or where the contempt is indirect, criminal proceedings may be instituted before a Divisional Court of the Queen's Bench Division of the High Court of Justice of England and Wales.

The **Contempt of Court Act, 1981** restricts the period of committal to prison for contempt where there is no express limitation to 2 years for a superior court. In this respect, **Section 14 (1)** of the **Contempt of Court Act, 1981** provides as follows:

> ***"In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."***

As we have shown the learned judge found the appellant guilty of a breach of the court order which had been made on 23rd March, 2015. The judge considered the matter before him and imposed the penalty which we have set out in this judgment. The appellant has not shown that the judge erred or misapprehended the law or abused power donated by the Judicature Act or the laws on contempt of court in an application for contempt of court or the laws on contempt of court in England which were applicable as provided by the Judicature Act. The judge did not err at all in the application of the relevant law.

Of significance we note that the Contempt of Court Act No. 46 of 2016 was declared unconstitutional by the High Court in a judgment delivered on 9th November, 2018 in High Court of Kenya at Nairobi **Constitutional Petition No. 87 of 2017 Kenya Human Rights Commission v The Attorney General & Another (ur)**.

But coming back to the matter before us we note that the application that was presented before the judge for review was dated 7th November, 2017. It sought to review part of the ruling and order made on 3rd March, 2017. It was stated in the motion as we have already seen that there was an error apparent on the face of the record; that the maximum legally permissible penalty for contempt of court was Shs.200,000; that the fine imposed was excessive which was an error and that estoppel could not be available against an express provision of law.

The application was brought under **Order 45** of the **Civil Procedure Rules** which is on review. It is a requirement under the said **Order 45** that an applicant to approach the court for review must have discovered 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. Such person may under the said provision of law approach the court for a review of the decree or order and that must be done without unreasonable delay.

Looking at the motion as drawn it did not satisfy the provisions of the said **Order 45** which is coached in a stricture where an applicant must fit himself for a court to allow a review. There must be discovery of new and important matter or evidence which was not available to a vigilant applicant who approaches the Court; the error must be apparent on the face of the record, not requiring detailed examination of facts, or sufficient reason be shown to the Court. The applicant should not sit back but must approach the Court speedily, without undue or unreasonable delay. In the oft-cited case of **National Bank of Kenya v Ndungu Njau Civil Appeal No. 211 of 1996 (ur)** this Court held on the isue of review:

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission 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 provision of law cannot be a ground for review."***

The application for review was taken to court nearly eight months after the ruling had been made and after the fine had been paid. There was no error apparent on the face of the record for the court to review. The appellant did not satisfy the conditions set out for an application for review and the judge was right to refuse it. This appeal has no merit and we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 27th day September, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR