IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU& KANTAI JJ.A)

CIVIL APPEAL NO. 148 OF 2018

BETWEEN

JULIUS OCHIENG OLOO.....1ST APPELLANT

FLORENCE THIRA OLOO.....2ND APPELLANT

AND

LILIAN WANJIKU GITONGA.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi, (E. O. Obaga, J.) dated 27th June, 2017

in

ELC. NO. 225 OF 2011)

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JUDGMENT OF THE COURT

[1] This is an appeal against a ruling of the ***Environment and Land Court*** (ELC) at Nairobi, (**Obaga, J.)** delivered on **27th June, 2017** dismissing the appellant's application for review in **ELC No. 225 of 2011. *Julius Ochieng Oloo*** and ***Florence Thira Ochieng*** (appellants) had sought injunctive orders from the ***ELC*** and in a ruling delivered on **17th November, 2011**, the appellants were directed to join ***City Council of Nairobi*** as a party to the suit to enable the court effectively determine the issue in dispute. After a period of more than two years, the appellants had not complied with the court's directions and this prompted the respondent to apply for dismissal of the suit for want of prosecution.

[2] The application seeking dismissal of the suit was heard and upon considering the parties' submissions, the court **(Nyamweya, J.)** delivered a ruling on 27th January, 2015 ordering that the suit be dismissed, and that the appellants bear the costs of the application and the entire suit.

[3] This is the ruling that aggrieved the appellants prompting them to file a notice of motion dated 19th February, 2015 seeking review and setting aside of the said orders. In support of the said application, the appellants contended that there were sufficient grounds for review of the said orders; that they had not been heard on merits of their application; that the dispute concerned Title and ownership of land which is an emotive one; that failure by the applicants to file an affidavit in their own name was premised on their advocate's defence strategy and not a sign of their lack of interest to pursue the matter as it was construed by the court; and that the delay in prosecution was partly because of attempts to have the case negotiated out of court and partly because of their advocate's busy schedule.

[4] The matter fell for hearing before **Obaga, J.** who after weighing the matters in contention found the application lacking in merit and dismissed it on the basis that the appellants' grounds for review did not meet the criteria set down under **Order 45 of Civil Procedure Rule** and that the grounds put forward in the application were better suited for determination by an appellate court. This is what the learned Judge stated in a pertinent paragraph in his own words;

> ***"A look at the applicant's grounds and affidavit in support of the application shows that the reasons for review are the same reasons which were raised in the affidavit in opposition to the application for dismissal of the applicant's suit for want of prosecution. Basically, there is therefore, nothing new the applicants are raising. The applicants seem to think that the application for dismissal of their suit was allowed because they did not swear an affidavit in their own name. A careful reading of***

the ruling by the Judge shows that this was not the reason for allowing the respondent's application. Even if this were to be the case, this cannot be a ground for review. It can only be a ground for appeal and since this is not an appellate court, that ground cannot be entertained before this court.

The decision by the applicants' former advocates who had filed judicial review matter which was later dismissed and the issue of the Applicants' current advocate being involved in election petitions arising from the 2013 general elections were considered by the Judge. Also considered was the movement of their current lawyer from the law firm of Asiema & Co to Ongoya & Wambola Advocates. The applicants cannot raise the same issue in the present application in which they are seeking review. If the Applicants felt that those issues were not addressed, the best forum would have been the appellate court, but they cannot raise the same issues before this court.

In Abasi Belinda vs. Fredrick Kangwamu & another (1963) EA 557 Bennet J had this to say: "…a point which may be good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an appeal". The Applicants herein seem to think that the Judge allowed the application for dismissal of their suit because they had not sworn the affidavit in opposition to that application in their name. This cannot be a ground for review.

It is clear from the above analysis that the applicants' application cannot succeed. The same is hereby dismissed with costs to the respondent"

[5] The appellants preferred this appeal on grounds that the learned Judge erred in law by dismissing their application for review despite the fact that there were sufficient grounds for review. They also faulted the leaned Judge for failing to take into consideration material information that would have supported an order of review and for misapplying the law on applications for review. They therefore urged us to set aside the ruling and to direct that **ELC No. 225 of 2011** be heard and determined to its logical conclusion with costs being awarded to them (the appellants).

[6] During the plenary hearing of this appeal, **Mr. Magira** learned counsel for the appellant, made oral submissions challenging for the first time the jurisdiction of the learned Judge, **Nyamweya, J**. to determine a matter concerning land and environment on the grounds that she was a High Court Judge. Counsel argued that the lack of jurisdiction ought to have been considered as a ground for review as it brought up new issues of law.

[7] Opposing the appeal was **Mr. Njau** learned Counsel for the respondents, stressed that the appellants' application had not met the requirements of **Order 45 Civil Procedure Rules** for review orders; that the issue of jurisdiction was not raised in the review application, nor was it a ground of appeal. Nonetheless counsel submitted that the Judge was determining a matter of law whether the suit should have been dismissed for want of prosecution and the appellant failed to show how the Judge failed to exercise her discretion according to the law. Therefore counsel urged us to dismiss the appeal and bring litigation to an end.

[7] We have considered the grounds of appeal, deliberated on the written submissions, the authorities cited and the law. The singular issue before us for determination is whether the learned Judge erred in dismissing the application for review. The appellants' contention is that the proceedings before a Judge of the High Court were a nullity for want of jurisdiction an issue that was belatedly introduced by counsel during the hearing.

[8] It is trite that jurisdiction is everything and without it a court has no power to make any further step and must down its tools. In **The Owners of the Motor Vessel Lilian 'S' vs. Caltex Kenya Ltd (1989) KLR 1), Nyarangi, J**. held as follows:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it"

Lack of jurisdiction renders a court's decision void; and when an act is void, it is a nullity *ab initio.* As was stated by Lord Denning in ***Benjamin Leonard Macfoy United Africa Company Limited* (UK)[1962] AC 152:**

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. … And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[9] Following the Supreme Court decision in **Republic vs. Karisa Chengo & 2 others [2017] eKLR**, it is now settled that although the High Court and the specialized Courts are of the same status, they have different jurisdictions. This flows from ***Article 165(5)*** of the **Constitution**, which prohibits the High Court from exercising jurisdiction in respect of matters "*reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in* ***Article 162(2)".***

In a more recent decision of this court in the case of **Patrick Kangethe vs. Co-operative Bank of Kenya CA No 83 of 2016**, held that a dispute over the loan amount payable under a charge or mortgage over land did not *isofator* connote a disposition of land. This is what the Judges stated in a pertinent paragraph of the said judgment;-

"To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under *Section 2* of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under *Section 13* of the *ELC Act* ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High court."

[10] That said the question before us is whether lack of jurisdiction by the court against which review was being sought albeit introduced late could have been a ground for review as envisioned under **Order 45** of the **Civil Procedure Rules**; and further, whether the *ratio decidendi* by the learned Judge is erroneous in law. The grounds for review as envisaged under the said order are limited to;

(a) Discovery of new and important matters or evidence which was not within the knowledge of the applicant or which could not be produced by him at the time when the decree or order was made;

(b) a mistake or error on the face of the record; or c) some other sufficient reason.

Supplemental to the above is that the application must be brought without unreasonable delay.

[11] It follows that lack of jurisdiction by the court making the ruling/order is not an error apparent on the face of the record, but rather an error of judgment that goes to the merit of the decision. Such an error can only be corrected by an appellate court. In **National Bank of Kenya Ltd vs. Ndungu Njau [1997] eKLR,** it was held that:

"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. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favor of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

[12] On our part we find ourselves agreeing with the learned Judge that the grounds raised by the appellants in support of their application were outside the scope of **Order 45 rule 1** of the **Civil Procedure Rules**. This is plainly obvious also in regard to this appeal which is against the ruling by **Obaga, J.** and there is no way we can be asked by any stretch of imagination to deal with the ruling of **Nyamwea, J.** as that would be tantamount to introducing an appeal through the backdoor. Also borrowing an analogy from the ***Kangethe's case*** (supra) it can similarly be argued that the matter for determination that was before **Nyamwea, J.** was an application to dismiss a suit for want of prosecution which did touch on the merits of the disputes therein.

[13] Furthermore, this matter involved the Judge's exercise of discretion in determining whether the reason(s) advanced by the applicant for the delay, being that their lawyer move from one law firm to another, was insufficient to justify the delay in prosecuting the case. This was held to be insufficient reason to persuade the Judge. We appreciate the rule requires a party to make an application for review without inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of each case although there are some established principles to be followed when considering whether delay is prolonged and inexcusable. Some were eloquently set out in the case of **Ngwambu Ivita vs. Akton Mutua Kyumbu [1984] KLR 441** as follows;

(a) Whether the delay is inordinate; and if it is whether the delay can be excused; and

(b) Whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible because of the delay.

[14] It is an established principle in our courts as set out in the oft' cited case of **Mbogo vs. Shah, EALR 1968** that a Court of Appeal will not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been *mis-justice.* The Judge in considering the application for review obviously had a reflection at the appellant's conduct from the time the suit was dismissed up to the date the application for review was filed. The appellants' contention that the delay was occasioned by their advocate's movement from one law firm to another, followed by his engagement in the 2013 presidential elections, was found farcical.

[15] We find no justification to hold otherwise; the appellants failed to enjoin themselves as directed by the court and further failed to set the suit down for hearing allowing the matter to remain unresolved for almost thirteen (13) years. The findings by **Obaga, J**. that he could not review the orders of a colleague Judge which was a matter for appeal and not review in all fronts including on jurisdiction is a sound one in law.

In the upshot, we think we have said enough to demonstrate this appeal lacks merit and the same is dismissed with costs to the respondent.

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

M. K KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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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