IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 25 OF 2018

BETWEEN

GERALD IHA THOYA.....APPELLANT

AND

THE REGISTRAR OF LAND, KILIFI.....1ST RESPONDENT

THE HON. ATTRONEY GENERAL.....2ND RESPONDENT

WERU GROUP RANCH.....3RD RESPONDENT

(An appeal from the ruling of the Environment and Land Court

at Malindi (Olola, J.) dated 19th September, 2017

in

***E.L.C No. 106 of 2012.*)**

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JUDGMENT OF THE COURT

1. **Muungano wa Wakulima**, an unincorporated group of farmers took out an originating summons against the **Registrar of Land Kilifi, Attorney General** and **Weru Group Ranch** (the 1st, 2nd and 3rd respondents respectively). **Gerald Iha Thoya** (the appellant) who described himself as the chairman of the said group swore the affidavit in support of the summons. The prayers sought included a declaration that the said group was the proprietor of **Parcel No. Kilifi/Weru/20** (suit property); registration of the suit property in favour of the group or its nominee; and an injunction restraining the respondents from subdividing, alienating, wasting or dealing in any manner with the suit property.

2. The suit was predicated on the grounds that following a dispute between the group and the 3rd respondent over **Parcel No. Kilifi/Weru/18** (original parcel), the group filed a claim reference number 3/6/2004 at the then Malindi Land Disputes Tribunal. The Tribunal in its award directed that the original parcel be subdivided into two, resulting in namely, Kilifi/Weru/19 and the suit property. The suit property was to be registered in favour of the group.

3. The above mentioned award was adopted as a judgment of the Principal Magistrate's Court at Malindi and a decree to that effect was issued on 11th July, 2005. According to the appellant, the respondents refused to comply with the said decree and instead the 1st respondent caused the suit property to be registered in favour of the 3rd respondent. The 3rd respondent went ahead to obtain the requisite consent to further sub-divide the suit property into 4,500 parcels without the knowledge of the group.

4. Further, on 29th June, 2012 the chief of the area where the suit property is situated informed the inhabitants of the intention to relocate them to pave way for an undisclosed development project. This did not go well with the inhabitants most of whom were members of the group, this state of affairs created unnecessary tension in the area.

5. In response, the 3rd respondent filed a preliminary objection to the effect that the group being an unincorporated body lacked *locus standi*

to institute the suit. Further, there was no authority executed by the members of the group authorising the appellant to sue on their behalf.

6. After hearing the parties on the preliminary objection the learned Judge (**Meoli, J.)** in a ruling dated 28th November, 2012 expressed:

> ***"However, the objections with regard to the capacity of the plaintiff to sue are valid and are upheld. In the interest of justice, I would order that the originating summons be amended accordingly in order to comply with Order 1 rule 13 of the Civil Procedure Rules and to demonstrate the legal capacity of the plaintiff to bring the suit.***
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> ***Such an amendment is to be made within 14 days of today's date, failing which the originating summons will stand as struck out. The costs of the preliminary objection will be borne by the plaintiff in any event."***

7. No amendment(s) was made by the appellant. Rather on 20th March, 2017 an application seeking review of the said ruling and more specifically the order on costs was filed. In the appellant's view, the court having found that the group lacked the capacity to sue or be sued meant that costs could not be imposed on such a group. Consequently, the imposition of costs was an error apparent on the face of the record which required to be reviewed.

8. In opposing the application, the 3rd respondent's advocate, Mr. Mulwa Nduya deposed that the appellant was guilty of laches having filed the application five years after the decision sought to be reviewed had been delivered. There was no error apparent on the face of record let alone any ground for review. The learned Judge is clothed with discretionary power to issue orders on costs in the manner she did. The appellant is disclosed agent of the group hence should bear the costs.

9. Faced with the rival arguments put forth by the parties, the learned Judge (**Olola, J**.) in a ruling dated 19th September, 2017 dismissed the application. In doing so he rendered himself as follows:

> ***"I am not satisfied that the award of costs to the 3rd Respondent by Meoli J on 28/11/2012 was an act of error that can be cured in the manner proposed by the Applicant. In my view, the Applicant's contention is that the Honourble Judge erred in awarding costs to a non-legal entity. That in my view is not an error as the Learned Judge had unfettered discretion to award the costs. In my considered view while it may be a ground for appeal, it certainly is not one for review in the manner proposed. The grounds as advanced suggests that the decision made by this Court on 28/11/2012 was erroneous in law. It equates an error in law simpliciter to a manifest error on the face of the record. That in my view should only constitute a ground of appeal where the intricacies as to the appropriateness of the award may be considered, but not for review."***

10. It is that decision that gave rise to the appeal before us which is anchored on the grounds that the learned Judge erred in law by-

> ***i. Holding that the award of costs against an unincorporated entity was not an error apparent on the face of the record.***
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> ***ii. Holding that the learned Judge had unfettered discretion to award costs in the manner she did***
>
> ***iii. Imposing the costs personally against the appellant.***

11. Mr. Kimani, learned counsel for the appellant, faulted the learned Judge for finding that the award of costs was not amenable to review. He reiterated that the learned Judge having found that the group was not capable to sue or be sued it followed that it could also not be condemned to bear costs. To bolster that line of argument, reference was made to the case of ***The Fort Hall Bakery Supply Co. vs. G. Fredrick Mwigai Wangoe [1959] EA 474*** wherein the **Templeton, J.** stated:

> ***"A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed… Since a non- existent plaintiff can neither pay nor receive costs there can be no order as to costs."***

12. Counsel also took issue with the imposition of costs personally on the appellant yet it was the group that sought review of the orders on costs. He argued that there was no legal basis for the appellant to be condemned to pay costs. In conclusion, he urged us to allow the appeal.

13. On her part, Ms. Ndeto, learned counsel for the 3rd respondent, submitted that the learned Judge's decision was well founded in law and incapable of reproach. She reiterated that the application for review was filed after inordinate delay contrary to ***Order 45 rule 1*** of the ***Civil Procedure Rules***. There was no error apparent on the face of the record.

14. She added that by virtue of ***Section 27*** of the ***Civil Procedure Act*** a court has absolute discretion to determine to whom and to what extent costs are to be paid. In that regard reliance was placed on the decision of the Supreme Court of Uganda in ***Impressa Ing Fortunato Federice vs. Nabwire*** **[2001] 2 EA 383.**

15. Counsel contended that the appellant deposed an affidavit in support of the originating summons indicating that he had instituted the suit in a representative capacity and on behalf of the group. As a result, there was nothing wrong with the learned Judge imposing costs of the review application on the appellant as the disclosed agent of the group. In the end, there was no reason for this Court to interfere with the impugned ruling.

16. We have considered the record, 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, we must be satisfied that any of 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.

17. A court's power to review a judgment or order as donated by ***Order 45*** of the ***Civil Procedure Rules*** should be exercised within the parameters set out thereunder. The parameters are that the applicant discovers 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, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The person aggrieved is also required to apply for the said review without undue delay.

18. To begin with the appellant herein filed the application for review after an inordinate delay of five years from the date of ruling which he sought to be reviewed. We are not persuaded that the explanation given attributing the delay to his former advocate's omission to keep him abreast on the case was reasonable.

19. Be that as it may, what constitutes an error apparent on the face of the record depends on the circumstances of each case. This Court in ***Muyodi vs. Industrial and Commercial Development Corporation & Another*** ***[2006] 1 EA 243*** described an error on the face of the record as follows:

> ***"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal."***

20. We find that the learned Judge appreciated the foregoing in holding and rightly so, that Meoli, J in issuing the orders on costs had exercised her discretion under ***Section 27*** of the ***Civil Procedure Act*** which stipulates:

> ***"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:…"*** *[Emphasis added]*

The learned Judge also appreciated that the question of whether or not the discretion was correctly exercised was a matter that could only be determined in an appeal and not in the review application.

21. Similarly, we see no reason to fault the following rationale by the learned Judge for imposing costs of the review application on the appellant:

> ***"To my mind in determining the issue of costs, the Court is entitled to look inter alia at (i) the conduct of the parties, (ii) the subject matter of litigation and (iii) the circumstances which led to the institution of the proceedings. In the present case, the Applicant Gerald Iha Thoya filed this case as the agent of the unincorporated association termed Mungano wa Wakulima. Five years after the suit was struck out and costs awarded to the 3rd Respondent, he has now brought the present application before the Court.***
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> **…**
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> ***In light of the foregoing and having taken due consideration of the conduct of the Applicant and the circumstances in which this present application was filed, I hereby dismiss the same with costs to the Third Respondent. The said costs shall be borne by the Applicant Gerald Iha Thoya."***

22. Accordingly, the appeal herein lacks merit and is hereby dismissed with costs to the 3rd respondent.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR