



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 74 OF 2017

BETWEEN

MPENZWE NGOBA MTANA

BIJUMA NGOBA MTANA (suing as the administrators/legal representatives

of the estate of Don Maurice Mutana APPELLANTS

AND

ZUHURA SHABANRESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Malindi

(Angote, J.) dated 31st July, 2014 in Civil Appeal No. 48 of 2018.)

JUDGMENT OF THE COURT

1. This is an appeal against a ruling dated 31st July, 2014 wherein the learned Judge (**Angote, J.**) in exercise of his unfettered discretion dismissed the appellants' application for review. Therefore, the central issue in this appeal is whether there is a basis for this Court to interfere with the exercise of the Judge's discretion.

2. It is settled that whenever the exercise of discretion is in issue, an appellate court will only interfere with such discretion where the Judge misdirected himself in some matter and as a result arrived at a wrong decision or he misapprehended the law or failed to take into account a relevant matter. See this Court's decision in ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.***

3. A brief background of the pertinent facts will place this appeal in context. The dispute revolves around the ownership of **Parcel No. Tezo/Roka/977** (suit land). **Zuhura Shaban** (the respondent) claims that the suit land belonged to her father, Shaban Mabruki who had passed away when she was a minor. Upon attaining the age of majority she discovered that Don Maurice Mutana (deceased) had not only encroached on the suit land but had also obtained title thereto. As far as the respondent was concerned, the deceased's title over the suit land had been obtained fraudulently.

4. As a result, the respondent lodged a claim in the then Bahari Land Disputes Tribunal (the Tribunal) against the deceased claiming ownership of the suit land by virtue of being the only heir of her late father's estate. In response, the deceased alleged that he had purchased the suit land from the respondent's step brother, Omar Jumaa. However, the said Omar gave evidence that he had not sold the suit land but had only mortgaged the same to the deceased as security for a loan he had received from the deceased. The deceased had refused to accept repayment of the loan.

5. The Tribunal in its award dated 23rd June, 2005 found that Omar was not a heir of the respondent's father's estate and had no capacity to sell the suit land. Consequently, the Tribunal declared the transaction between Omar and the deceased illegal. It also called for the cancellation of the deceased's title and for the same to be re-issued to the respondent. The deceased was not amused by that decision and he filed an appeal in the Provisional Land Dispute Appeals Committee (Appeals Tribunal) which was dismissed.

6. Unrelenting, **Mpenzwe Ngoba Mtana** and **Bijuma Ngoba Mtana** (the appellants) who happen to be the legal representatives of the deceased's estate preferred an appeal this time round in the Environment and Land Court (ELC) being Civil Appeal No. 48 of 2010.

Basically, the appellants challenged the jurisdiction of the Tribunals to entertain the dispute which involved registered land.

7. It is at the hearing of this appeal that the respondent raised an issue concerning the competency of the appeal before the ELC. In her view, the appeal was not suited since it had been filed out of time without leave of the court. Elaborating further, she contended that the determination of the Appeals Tribunal was delivered on 21st September, 2009 while the memorandum of appeal in the ELC appeal was filed on 27th September, 2010, outside the stipulated time frame of sixty days under **Section 8(a)** of the **Land Disputes Tribunal Act (repealed)**.

8. The learned Judge addressed his mind to the objection raised and in a judgment dated 28th March, 2014 he expressed:

“The decision of the Land Appeals Committee was delivered on 21st September 2009 by the Chairman and two other members. The said decision is handwritten. The Appellant had the said handwritten decision certified as a true copy of the original on 21st September 2010.

The Memorandum of Appeal in respect to the decision of the Appeals Committee was filed in this court on 27th September 2010, one year after the decision of the Appeals Committee without the leave of the court. It is not true, as submitted by the Appellant’s advocate that the Appeals Committee heard the appeal on 20th May 2010 and delivered its decision on 21st September 2010 and that while the Appellant was waiting for the decision, he died on 23rd August, 2010.

Even if the Appellants' father died before the Appeals Committee delivered its decision, which is not true, it was incumbent on the Appellants to seek the leave of the court to file the Appeal out of time.

In view of the fact that the appeal herein was filed out of time without the leave of the court, I shall, which I hereby do, strike out the appeal with costs.”

9. Thereafter, the appellants filed an application dated 3rd April, 2014 seeking *inter alia* review of the aforementioned judgment on the ground that there was an error apparent on the face of the record. The error being that the learned Judge had solely relied on the handwritten decision of the Appeals Tribunal which erroneously indicated that the determination therein was delivered on 21st September, 2009 as opposed to 21st September, 2010. The respondent in her replying affidavit to the application for review confirmed that the determination was delivered on 21st September, 2010. Further, the appellants annexed a notice dated 3rd September, 2010 which was apparently sent to the deceased by the Chairman of the Appeals Tribunal indicating that determination would be delivered on 21st September, 2010. Therefore, the appeal in the ELC was filed within the requisite time frame.

10. Opposing the application, the respondent maintained that both the deceased and herself were present when the Appeals Tribunal’s decision was delivered on 21st September, 2009. She explained that there was a typographical error in her replying affidavit to the review application with regard to the date that the determination in issue was delivered. She also deposed that the alleged notice issued by the Appeals Tribunal was suspect since firstly, it did not form part of the record of appeal before the ELC and was only produced after the appeal was struck out. Secondly, the respondent had not received a copy of the said notice.

11. Faced with the foregoing, the learned Judge in the impugned ruling dismissed the application for review with costs. It is in respect of this decision that the appellants complain that the learned Judge erred and misdirected himself by-

i. Relying solely on the handwritten decision of the Appeals Tribunal.

ii. Failing to appreciate that the respondent had admitted in her affidavit that the determination was delivered on 21st September, 2010.

iii. Speculating that after hearing the parties the Appeals Tribunal could not have reserved its decision for a period of one year.

iv. Failing to appreciate the notice of the reading of the award attached to the appellants’ application.

12. At the hearing, learned counsel, Mr. Mwangunya appeared for the appellants while learned counsel, Mr. Kimani appeared for the respondent. Counsel relied entirely on the written submissions filed on behalf of the parties.

13. While reiterating their position at the ELC the appellants argued that based on the material placed before that court the inconsistency with regard to the date that the decision in the Appeals Tribunal was delivered should have been resolved in their favour. They faulted the learned Judge for basing his decision on speculation and for ignoring the notice annexed to the application for review which to the appellants became part of the record.

14. We also understood the appellants to submit that in the alternative we should allow the appeal on the basis that the Tribunals decisions were void for the reason that they lacked jurisdiction to deal with title to land. We must point out that the issue raised by this line of submission is neither an issue which is subject of the appeal before us nor was it an issue in the application for review at the ELC and as such we cannot entertain the same.

15. On her part, the respondent argued that the alleged notice from the Appeals Tribunal did not form part of the record before the ELC. Attacking the veracity of the said notice, the respondent submitted that it was absurd that the notice dated 3rd September, 2010 which the

appellants rely on would be issued after the demise of the deceased. According to her, there was no reason for this Court to interfere with the learned Judge's discretion.

16. The respondent also went on to contend that the appeal before us was filed out of time without leave of the Court and urged us to strike it out. The proviso to **Rule 84** of the **Court of Appeal Rules** is clear on when such an objection to the competency of an appeal can be raised. The provision stipulates:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.” [Emphasis added]

17. The record herein was filed on 19th October, 2017 and the objection by the respondent was raised in her submissions which were filed on 25th May, 2018. This is clearly outside the time frame prescribed by the proviso. Consequently, the objection fails.

18. We have considered the record, submissions by the respective parties and the law. 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 appellants' application for review was anchored on the ground that there was an error apparent on the face of the record.

19. This Court while considering when a review may be granted on the basis of an error apparent on the record in **National Bank Of Kenya Limited vs. Ndungu Njau [1997] eKLR** aptly observed:

“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 ground for review.”

20. Applying the above principles to the case at hand we find that the learned Judge properly addressed himself on the requisite conditions for allowing an application for review. We concur with the following findings of the learned Judge:

“The Respondent has annexed on his Replying Affidavit the typed proceedings of the Appeals Committee which have been certified as true copies of the original. In those proceedings, it is indicated that the late Don Maurice Mutana and the Respondent were heard on 20th May, 2009 and a decision was made on 21st September, 2009.

It is improbable that after hearing the parties, on 20th May, 2009, the Appeals Committee reserved its decision until 21st September, 2010, which is over one year down the line. It is also improbable that three members of the Committee signed the decision with a date of 21st September, 2009 without noticing the said error.

Indeed, the person who certified the proceedings and the decision of the Appeals Committee on 21st September, 2010 should not have certified the decision with the purported erroneous date. It is at the point of certification that the error on the issue of the date, if at all it was an error, should have been corrected considering that the Appeals Committee was still in existence as at 21st September 2010.

Considering that the Proceedings that are being relied on in the Appeal show that the decision of the Appeals Committee was made on 21st September, 2009, it will be unprocedural at this stage for this court to hold that the decision of the Appeals Committee was made on 21st September, 2010 and not 21st September, 2009. Those proceedings form part and parcel of the Record of Appeal. The purported error is not self-evident on the part of this court or the Appeals Committee.

This court cannot rely on a hearing notice that was purportedly issued to the Appellant in the absence of an affidavit of the person who said to have prepared and signed the said hearing notice.”

21. Accordingly, there is no reason to justify our interference with the learned Judge's discretion. We find that the appeal lacks merit and is hereby dismissed with costs.

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