



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 300 OF 2014

TIRAS KARANJA NGATHA.....APPELLANT

AND

SILAS GACHUGU NGUGI.....1ST RESPONDENT

THE LAND REGISTRAR, KIAMBU.....2ND RESPONDENT

(Appeal from the ruling and order of the Environment and Land Court at Nairobi, (Mutungi, J.) dated 27th July 2014

in

ELCC NO. 772 OF 2012)

JUDGMENT OF THE COURT

In this appeal, the appellant is aggrieved by the order of the *Environment and Land Court, (Mutungi, J.)* dated 27th July 2014 by which the learned judge, in exercise of the powers conferred by *section 80* of the *Civil Procedure Act* and *Order 45 Rules 1 and 2* of the *Civil Procedure Rules*, reviewed his earlier ruling dated 16th April 2013 resulting in transfer of a piece of land measuring in area approximately 0.5 acres, from the appellant to the 1st respondent. The background to this appeal is a genuine mistake on the part of the appellant and the 1st respondent, but human nature being what it is, both have not been candid or reasonable enough to resolve the problem amicably.

But for a mistake, which was not discovered for almost 40 years, the appellant, *Tiras Karanja Ngatha*, was the registered owner of the property known as *Kiambaa/Kihara/458*, measuring in area, 2.2 acres. His neighbour, *Ngugi Waweru Munga (deceased)*, whose estate is represented in these proceedings by one of his sons, *Silas Gachugu Ngugi*, who is also the administrator of the Estate (1st respondent), was the registered owner of a slightly bigger adjacent property known as *Kiambaa/Kihara/467*, measuring in area 2.7 acres. Both parcels of land were registered under the repealed *Registered Land Act*, with the appellant being registered on 14th September 1970 and the deceased on 11th May 1968. By some incredible mistake or oversight, which both parties concede, the appellant took possession and occupied *Kiambaa/Kihara/467*, the bigger parcel while the deceased took possession of the smaller *Kiambaa/Kihara/458*. For 40 years, both parties developed and worked the respective parcels that they

occupied, assuming them to be their lawfully registered properties. The effect was that the appellant had the advantage of 0.5 acres, which he was otherwise not entitled to, while the deceased had a corresponding disadvantage.

The deceased died on 11th April 2005 and was buried on Kiambaa/Kihara/458. On 3rd May 2011, the 1st respondent petitioned for letters of administration intestate for the estate of the deceased in ***Kiambu Chief Magistrate's Court Succession Cause No 129 of 2011***. Naturally he listed Kiambaa/Kihara/467 as the only asset of the Estate. The appellant, who by that time had discovered the mistake made by him and the deceased, was not amused and immediately objected to the issue of grant, contending that he was in occupation of Kiambaa/Kihara/467 and that he had developed and invested in it at great expense. The objection by the appellant notwithstanding, the grant of letters of administration intestate of the estate of the deceased was issued to the 1st respondent on 30th May 2012.

Undeterred, the appellant, on 18th October 2012, took out an originating summons under the Limitation of Actions Act seeking to be declared the owner of Kiambaa/Kihara/467 by adverse possession. In the alternative he prayed for an order compelling the 2nd respondent, the ***Land Registrar, Kiambu***, to rectify the register to the intent that the appellant would be registered as the proprietor of Kiambaa/Kihara/467 while the 1st respondent would be registered as proprietor of Kiambaa/Kihara/458, so that the ownership and occupation of the two parcels would be reconciled. Simultaneously with the summons the appellant filed a Motion on Notice seeking a temporary injunction restraining the 1st respondent from entering or interfering with the appellant's occupation of Kiambaa/Kihara/467 and an order for stay of further proceedings in the Succession Cause.

By a replying affidavit sworn on 6th November 2012, the 1st respondent opposed the originating summons as related to the claim for adverse possession, contending that in the circumstances of the case the claim could not be sustained. However, he deposed that he was not averse to resolution of the confusion about the two properties, so long as 0.5 acres was transferred from Kiambaa/Kihara/467 and amalgamated with Kiambaa/Kihara/458 to reflect the parties' actual entitlement in acreage.

By a ruling dated 16th April 2013, the learned judge made an order for maintenance of the status quo and stayed further proceedings in the succession cause. The learned judge also ordered the 2nd respondent to rectify the titles for Kiambaa/Kihara/467 and Kiambaa/Kihara/458 so as to correspond with the parcels as occupied by the parties. The learned judge however did not address himself to the fact that one parcel was 0.5 acres bigger than the other.

That order aggrieved the 1st respondent to the extent that he was to receive a parcel measuring 2.2 acres whereas in fact he was the registered owner of a parcel measuring 2.7 acres. The fact of the matter is that for the better part of 40 years the deceased had occupied a parcel of land, which was 0.5 acres less than he thought, and the appellant had occupied one which was 0.5 acres more than he thought. For that period, the mistake regarding the 0.5 acres appears to have broken no bone.

But the love of and craving for ownership of land being what it is in Kenya, the 1st respondent was convinced that he was short-changed and that the appellant had been enriched at his expense. Accordingly on 6th May 2013, he moved the court under section 80 of the Civil Procedure

Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules for review of the ruling so that 0.5 acres would be hived off Kiambaa/Kihara/467 and added to Kiambaa/Kihara/458.

It was now the turn of the appellant to play hardball. By an affidavit sworn on 24th July 2013, he opposed the application for review contending that there was no new evidence that was not within the knowledge of the appellant at the time the earlier application was heard and determined and that in any event the order of the court had already been implemented. By the ruling dated 27th June 2014, the subject of this appeal, the learned judge found that there existed sufficient reason to justify an order of review. Accordingly he granted the application and ordered the appellant to either pay to the 1st respondent the

value of the 0.5 acres or in the alternative to subdivide Kiambaa/Kihara/467 and transfer a portion of 0.5 acres to the 1st respondent.

It is that order that the appellant now challenges in this appeal.

Although he has set forth four grounds in his memorandum of appeal, in our view they boil down to two issues, namely whether the learned judge misapprehended the grounds upon which an order for review will issue and whether execution of the order of 16th April 2013 was a bar to an order of review. By consent, the appeal was heard through written submissions.

Prosecuting the appeal, Mr Irungu, learned counsel for the appellant submitted that under Order 45 of the Civil Procedure Rules, an application for review can lie on only three instances, namely discovery of a new and important matter or evidence which, after exercise of due diligence, could not be produced by the 1st respondent at the time the order was made; a mistake or error apparent on the face of the record; and any other sufficient reason. Counsel further contended that the issue of the 0.5 acres was not a new matter as it was within the knowledge of the 1st respondent and that indeed he had raised it in his replying affidavit to the summons. In counsel's view, by making an order for review in the circumstances of this case, the learned judge had effectively sat on appeal against his earlier order, which is not permitted by the law. Relying on the judgment of this Court in *Kaiza v. Kaiza [2009] KLR 499*, the appellant submitted that the basis upon which an application for review is made must be clear and that to rely on discovery of new evidence, the applicant must show that he has acted with diligence and further that the existence of the evidence was not within his knowledge at the time. In this case, it was submitted, the 1st respondent had not met the threshold to entitle him to an order of review. The appellant also urged that there was no mistake or error apparent on the face of the record, which the 1st respondent could have relied on in support of the application for review.

On the second ground of appeal, the appellant submitted that it was common ground that the order of the court dated 16th April 2013 had already been executed by the time the application for review was made. In the appellant's view, execution of the order meant that there was nothing left to be reviewed. Accordingly we were urged to find that the learned judge had erred when he entertained the application for review.

The respondents opposed the appeal through his learned counsel,

Mr Gatumuta, contending, in short and succinct submissions, that the learned judge had not erred as regards law on review. The respondents' contended that the application for review was not based on discovery of new evidence or error on the face of the record, but on "other sufficient reason". In their view, the sufficient reason, which the learned judge agreed with was the unjust enrichment of the appellant, which was not the intention of the order for rectification of the register. It was contended that the order for rectification was only intended to remove the disconnect between the parcels of land registered in the respective names of the appellant and the 1st respondent and the parcels that they were in actual occupation of, without giving any of the parties a bigger or smaller parcel than that registered in their names. Accordingly the respondents urged us to find the appeal misconceived and to dismiss it with costs.

We have carefully considered the record of appeal, the grounds of appeal, the two rulings by the learned judge, the submissions by the parties and the law. We readily agree with the 1st respondent that his motion for review of the ruling dated 16th April 2013 was not based on error on the face of the record or discovery of new evidence which was not available at the time the learned judge made the order of 16th April 2013. Although the application does not specifically state that the reason for review is "other sufficient reason", the grounds upon which the application was made and the averments in the supporting affidavit left no doubt that the 1st respondent was relying on "other sufficient reason" and in particular the contention that his parcel had ended up being smaller by 0.5 acre than he was entitled to while the appellant's parcel became bigger by the same size from his true and lawful entitlement.

The learned judge too had no illusion that the application before him was founded on other sufficient reason. This is how he expressed himself:

“Under order 45(1) of the Civil Procedure Rules, a court can review its judgment, decree or order if there is discovery of new and important matter or evidence that was not available at the time the judgment or order was made or on account of some mistake or error apparent on the face of the record, or other sufficient reason. In the present matter it is clear that at the time of making the order sought to be reviewed there was no consideration of the varying sizes of the two parcels of land. The plaintiff by reason of the rectification order would get a parcel of land that is 0.5 acres larger than the plaintiff’s parcel of land as per his title before rectification. The 1st defendant on the other hand would receive a title that is 0.5 acres less than the size of the title he held before the rectification. The intention of the court in ordering rectification was never to confer on any party a benefit and or advantage that he was not entitled to or to take away any party’s right or benefit. In the premises I am satisfied there is sufficient cause and or reason for the court to review its order of 16th April 2013 pursuant to order 45 rule 1 of the Civil Procedure Rules 2010 and I accordingly order that the order be reviewed in the following manner...” (Emphasis added).

In *Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd*, CA No. Sup. 16 of 2012, this Court considered the rationale of the power of review that is vested in the courts and stated thus in paragraphs 26 and 27:

“The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice. In the High Court, both the Civil

Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”

Authority from this Court abound on the meaning and import of the words ***“or for any other sufficient reason”*** in Order 45 Rule 1 (1).

In *Wangechi v. Kimita & Another v Mutahi Wakibiru [1982-88] 1 KLR 977*, the Court stated that “any other sufficient reason” in the provision need not be analogous with the other grounds in the Order and is therefore not confined to the other kinds of reasons specified in the Order. That view was affirmed in *Shanzu Investments Ltd v Commissioner of Lands, CA No. 100 of 1993* where the Court stated that the provision under consideration confers on the court unfettered discretion to review its own decrees or orders for any sufficient reason. Similarly, in *Official Receiver & Liquidator v. Freight Forwarders Kenya Ltd, CA No. 235 of 1997, Gicheru, JA.* (as he then was)

observed as follows:

“Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice “be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record.”

(See also *Pancras T. Swai v. Kenya Breweries Ltd, CA No. 275 of 2010*).

Having carefully considered this appeal, we do not find any basis for faulting or interfering with the exercise by the learned judge, of his discretion to review the ruling of 16th April 2016. There was

sufficient reason in the form of the unintended transfer of 0.5 acres of the property that was registered in the name of the 1st respondent to the appellant.

We do not think that implementation of the order of 16th April 2013 is a bar to an order of review. Nothing irreversible has happened upon implementation of the order. Indeed all that has happened is that the appellant has been registered as the owner of an extra 0.5 acres that he was not entitled to. If he wishes to keep it, all he has to do is pay the 1st respondent its value. If he does not, a portion of 0.5 acres will simply be excised from his land and transferred to the 1st respondent. Nothing has happened in the circumstances of this appeal to render the order of review futile or an order issued in vain.

We agree that this appeal is bereft of merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR