



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NYERI  
(CORAM: WAKI, NAMBUYE & SICHALE, JJA)  
CIVIL APPEAL NO. 52 OF 2015

BETWEEN

FREDRICK MUTONYI GITONGA.....APPELLANT

VERSUS

DANIEL KIBE RITHO (Administrator of the Estate of

ROBINSON RITHO KIHARA –Deceased).....DEFENDANT

*(Appeal from the Ruling and Order of the High Court of Kenya at Eldoret (Ombwayo, J) (Delivered by Lucy Waitthaka, J) Dated 19<sup>th</sup> February , 2015*

in

H.C.C.C. No. 50 of 2003 )

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JUDGMENT OF THE COURT

The background to this appeal is that the respondent **Daniel Kibe Ritho**, (the respondent) filed Nyeri HCCC No. 50 of 2003 vide a plaint dated the 6<sup>th</sup> day of June, 2003 against **Fredrick Mutonyi Gitonga** (the appellant) seeking an order for the delivery of vacant possession of **Land parcel number Othaya/Kiahagu/754** (the suit property). The basis of the claim was that the suit premises had initially belonged to the appellant who had charged it as security to Barclays bank Kenya Limited (The bank) but was unable to service the loan prompting the bank to exercise its statutory power of sale under the charge, by way of public auction in which the deceased **Robinson Ritho Kihara** (the deceased) as the successful bidder was issued with a free hold title in respect thereof on the 14<sup>th</sup> day of September, 1988.

The appellant resisted the respondent's claim by averring *inter alia* in his defence that he had been in occupation of the suit premises for more than twelve (12) years after the same had been transferred in the name of the deceased and he had therefore acquired title to the suit property through adverse possession.

The merit disposal of the suit resulted in the judgment of **M.S.A. Makhandia, J** (as he then was) dated the 22<sup>nd</sup> day of July, 2009 vide which the learned Judge allowed the respondent's claim against the

appellant, dismissed the appellant's defence and issued orders for his eviction from the suit property. The appellant was aggrieved and he filed a Notice of Appeal and an appeal mentioned in the affidavit in support of the application for review as appeal No.97 of 2012 and Civil Application No.2 of 2012.

It is not clear from the scanty information on the record as to when the respondent filed a Notice of Motion dated the 26<sup>th</sup> day of September, 2012 seeking eviction of the appellant from the suit property. It is however evident from the record that Civil Application No. 2 of 2012 filed by the appellant to seek stay of execution of the judgment of Makhandia, J of 22<sup>nd</sup> July, 2009 was heard and rejected by the court on the 6<sup>th</sup> day of February, 2013. On the 30<sup>th</sup> day of May, 2013 and during the pendency of the respondent's application dated 26<sup>th</sup> September, 2012, the appellant filed a Notice of Motion seeking review of the judgment of M.S.A. Makhandia, J dated 22<sup>nd</sup> day of July, 2009.

Both applications were heard together resulting in the impugned Ruling of A. Ombwayo, J signed at Eldoret on the 11<sup>th</sup> day of February, 2015 and delivered on the 19<sup>th</sup> day of February, 2015 by **Lucy Waithaka, J** in which the learned judge dismissed the appellant's application for review but allowed the respondent's application for eviction.

The appellant was aggrieved. He is now before us on a first appeal raising nine (9) homemade grounds of appeal. These may be rephrased as follows:-

The learned Judge of the High Court erred and misdirected himself in fact:-

***(1) When he refused to consider that the appellant took up uninterrupted occupation and use of Land Parcel Othaya/Kiahagu/754 as a squatter for a period of about fifteen years from 14<sup>th</sup> September, 1988.***

***(2) When he failed to find that the respondent illegally brought Nyeri High Court Civil Suit No. 50 of 2003 on 6<sup>th</sup> June, 2002.***

***(3) When he illegally allowed the respondents notice of Motion dated the 26<sup>th</sup> day of September, 2012.***

***(4) When he illegally dismissed the appellant's notice of Motion dated the 30<sup>th</sup> day of May, 2011.***

The appellant who appeared in person at the hearing of the appeal handed in a document titled issues for determination which he adopted as his submissions in support of his appeal. The appellant's submission is that the suit premises originally belonged to him; the same was sold by public auction to the deceased who was issued with a title deed with regard thereto on the 14<sup>th</sup> day of September, 1988; the appellant filed **civil suit No.7 of 1989** on which he anchored an application dated the 19<sup>th</sup> day of January, 1989 seeking orders of status quo which were subsequently granted by F.E. Abdullah, J (as he then was) restraining the deceased from entering the suit premises which orders remained in force until the year 1997 when the deceased passed on, by which time a period of twelve years had elapsed and the appellant had therefore acquired adverse possession of the suit property.

Further that the adverse possession acquired by the appellant was not in any way affected by the respondent's institution of **Nyeri HCCC No.50 of 2003** as the said action was already barred by the statute of Limitation of Actions Act, and was therefore null and void; the resulting judgment of M.S.A.Makhandia, J dated the 22<sup>nd</sup> day of July 2009 was also null and void and should not have formed the basis of the application for eviction dated the 26<sup>th</sup> day of September, 2012; the orders of 19<sup>th</sup> February, 2015 were also tainted, null and void and should have been dismissed. Instead, his application dated the 30<sup>th</sup> day of May, 2013 seeking review of the judgment of M.S.A. Makhandia, J of 22<sup>nd</sup> July, 2009 which was properly laid should have been allowed.

In a brief response to the appellant's submissions, learned counsel for the respondent, **Mr. Peter**

**Muthoni**, submitted that the appeal has no merit as the appellant purports to challenge the main judgment of M.S.A. Makhandia, J of July, 2009 through the back door in the absence of any Notice of Appeal filed against the said judgment; the appellant opted for an application for review dated the 30<sup>th</sup> day of May, 2013 which he meritoriously lost; and lastly that the appeal has been overtaken by events as the appellant has already been evicted from the suit property and the decree fully satisfied.

In reply to the respondent's submission, the appellant reiterated his earlier submissions and added that his appeal is proper as presented as he has appealed against the order refusing to review the judgment of M.S.A. Makhandia, J of the 22<sup>nd</sup> day of July, 2009.

This is a first appeal resulting from two opposing applications that were heard together and which called for the exercise of discretion by the trial court. The principles that guide the exercise of judicial discretionary power were well set out by Ringera, JA ( as he then was) in the case of **Githiaka versus Nduriri [2004] 2KLR67**. These are that such discretion should be exercised on sound reason, rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it. The principles that guide interference with the exercise of such a discretion by an appellate court were well put by the predecessor of this court in the case of **Mbogo and Another versus Shah [1968] EA93**, namely for an appellate court to do so, it must be satisfied that the judge misdirected himself in some matter, and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been misjustice.

We have considered the totality of the record in the light of the judgment of M.S.A. Makhandia, J dated the 22<sup>nd</sup> day of July, 2009 the impugned ruling and the rival submissions set out above. In our view, only one issue falls for our determination, namely, whether the learned judge A. Ombwayo, J exercised his discretion judiciously when he declined to review and set aside the judgment of M.S.A. Makhandia J of the 22<sup>nd</sup> July, 2009 in favour of the appellant, but instead allowed the respondent's application of 26<sup>th</sup> September, 2012 seeking eviction of the appellant from the suit premises.

In the main judgment of the 22<sup>nd</sup> day of July, 2009 Makhandia, J, evaluated and analyzed the pleadings and evidence and *inter alia* made findings that the appellant was previously the registered proprietor of the suit property which he had used as security for a loan facility from the bank and in respect of which he defaulted payment prompting the suit property to be auctioned by the bank in the exercise of its statutory power of sale. The deceased as the successful bidder at the auction was subsequently registered as the proprietor of the suit property on the 14<sup>th</sup> day of September, 1988. The Judge further found that after the deceased had been registered as proprietor, of the suit property, the appellant sued him over the same vide Nyeri HCCC No. 7 of 1989 and obtained orders which perpetuated his stay on the suit property. The respondent contended that the continued stay on the property was illegal and initiated **Nyeri HCCC No.50 of 2003**, seeking eviction of the appellant. In the course of the trial the appellant failed either to cross-examine the witnesses tendered by the respondent in support of his (appellant's) case or offer evidence in support of his defence despite being given an opportunity to do so. The respondent's evidence was therefore unchallenged in the circumstances. The court held that time for purposes of **Section 38** of the Limitation of Actions Act stopped running in favour of the appellant and against the respondent when the appellant sued the deceased over the suit property. It only started running again as soon as the suit HCCC No.7 of 1989 was dismissed for want of prosecution on an unknown date. On that account the learned judge declared the appellant a trespasser and ordered his eviction.

It is the above findings that the appellant moved to review and set aside in his Notice of Motion dated the 30<sup>th</sup> day of May, 2013. The grounds he put forth in support thereof were that he had been in uninterrupted occupation of the suit premises for fifteen years from 14<sup>th</sup> September, 1998 to 6<sup>th</sup> June, 2003 when the respondent moved to court to seek vacant possession; that he was ignorant of the law and Civil Procedures; that the matter had not been properly fixed for hearing, and, lastly that Civil Appeal No 97 of 2012 and Civil Application No. 2 of 2012 were not arguable and that is why he had an intention to withdraw both of them in favour of the application for review.

In rejecting the appellant's application for review, the learned Judge reasoned that there was no proof that the Notice of Appeal filed in respect of the very judgment the appellant sought to have reviewed had been withdrawn and therefore the co-existence of both the appellate and the review processes against the same judgment of the 22<sup>nd</sup> July, 2009 was an abuse of the court process; second, that the appellant had failed to demonstrate existence of any new matter or evidence which after the exercise of due diligence was not within his knowledge or could not have been produced by him at the time when the decree was passed or the order made. Furthermore he had not pointed out any error or mistake apparent on the face of the record or given any sufficient reason to enable the court to review the said judgment. All that he had advanced before the learned judge as the reason for seeking review was a plea of entitlement to the suit premises by way of adverse possession, which according to the learned Judge was not one of the prerequisites the appellant was obligated to establish before seeking relief under **Order 45 rule (1) of the Civil Procedure Rules**.

We have considered the above reasoning in the light of the record before us. It is our view, that there has been no demonstration of how the learned Judge fell into error in concluding as he did. He applied the correct principles of law on the prerequisites for review under **Order 45 (1) of the Civil Procedure Rules**. **Order 45(1)** of the Civil Procedure rules provides as follows:-

**(1) "Any person considering himself aggrieved-**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of 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, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

It is evident from the above provision that a party aggrieved by a decree or an order from which an appeal is allowed but from which no appeal has been filed has to make an election either to proceed by way of appeal or review. The appellant's application for review came up before he had terminated the appellate process initiated against the same judgment through Civil Appeal No.97 of 2012 but both processes could not co-exist. The appellant has not demonstrated before us that the Notice of Appeal in respect of that appeal had been withdrawn as at the time the application for review came up for hearing and determination. We also agree with the learned judge's finding that a claim for adverse possession was not one of the reasons required to be established under **order 45 (1)** of the Civil Procedure rules. Neither in the circumstances of this appeal did it qualify as a new and important matter that due diligence on the part of the appellant could not have brought on board at the time the suit was heard. The appellant, had in fact raised it in his defence which he failed to advance, first, by cross-examining the respondent's witnesses on the one hand, and by advancing his own evidence in support of his defence on the other hand. It is on record that he declined to do so despite the trial court giving him an opportunity to do so. We find no reason to doubt the learned judge's observations of this conduct on the part of the appellant.

He has alleged ignorance of court procedures and also that the case was not properly fixed for hearing. There is observation by the learned judge (M.S.A. Makhandia, J) that it is the appellant who took the hearing date for the hearing of the main suit. We find nothing on the record to show that the appellant either raised any objection to the hearing then as scheduled or sought an adjournment to prepare his case. He simply declined to cross-examine the respondent's witnesses and tender his own defence. At all events he did not give this as one of the reasons for seeking review.

Turning to the respondent's application for eviction acceded to by the learned Judge, it is our finding that the learned judge cannot be faulted for allowing the same because, after the appellant's application for review was rejected the court had no reason to withhold the exercise of its discretion to facilitate the

respondents full enjoyment of the fruits of his judgment.

The upshot of all the above is that the appeal has no merit and is accordingly dismissed with costs to the respondent both on appeal and the court below

**DATED, READ AND DELIVERED AT NYERI THIS 1<sup>ST</sup> DAY OF MARCH, 2017.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**