



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 130 OF 2016

BETWEEN

HAITHAR HAJI ABDI.....1ST APPELLANT

ABDI HAITHAR HAJII.....2ND APPELLANT

AND

SOUTHDOWNS DEVELOPERS LIMITED.....RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Nairobi (Mutungi, J.) dated 20th June, 2014

in

E.L.C. No. 1389 of 2004)

JUDGMENT OF THE COURT

1. This appeal is part and parcel of the protracted litigation revolving around L.R No. 13154 (suit property) which was initially registered in favour of the appellants. The appellants had charged the suit property in favour of Kenya National Capital Corporation as security for a financial facility. Upon default on the appellants' part, Kenya National Capital Corporation exercised its statutory power of sale and sold the suit property vide public auction to the respondent on 14th November, 1991. Thereafter, the appellants challenged the validity of the said sale but the High Court (Waki, J., as he then was) by a judgment dated 15th October, 2003 in H.C.C.C No. 6054 of 1991 consolidated with H.C.C.C No. 1181 of 1992, found that the auction was properly conducted and directed specific performance of the same. The suit property was eventually registered in favour of the respondent on 20th July, 2004.

2. Thereafter, efforts by the respondent to get vacant possession came to naught and he filed a suit in the Environment and Land Court (E.L.C) being E.L.C. No. 1389 of 2004 claiming that the appellants were trespassers. By a judgment dated 29th April, 2013, the trial court (Mutungi, J.) issued the following orders against the appellants:-

- ***An eviction order do issue against the defendants (appellants herein), their servants, agents, tenants, licencees or any other person whosoever from the plaintiff parcel of land reference***

number 13154 (original number part of 6861/4) Nairobi.

- *A permanent injunction restraining the defendants by themselves, their servants, agents, tenants, licencees and/or any person whatsoever from being, remaining, entering in, continuing in occupation, eviction, construction of any structures whatsoever on the plaintiff's parcel of land reference number 13154 (original number part of 6861/4) Nairobi.*
- *General damages in the sum of Kshs. 6,300,000/= together with interest thereon at court rates from the date of this judgment.*

3. Aggrieved by that decision, the appellants filed a notice appeal and also sought stay of execution of the judgment before this Court which was declined.

Subsequently, the appellants filed an application dated 28th November, 2013 before the trial court seeking *inter alia*;

i. A temporary injunction restraining the respondent/ plaintiff from in any manner dealing with the suit property L.R. No. 13154 Langata- Karen Nairobi pending the hearing and determination of the instant application.

ii. The court do review, vary, and/or set aside the orders issued on 9th October, 2013, the decree issued on 3rd June, 2013 emanating from the judgment delivered on 29th April, 2013 and all other consequential orders emanating from the same and the suit herein be dismissed with costs.

iii. That the suit herein and any other suits related to this suit between the parties herein where Southdowns Developers limited appears as a plaintiff be declared a nullity in law or void abinitio and/or any suit by Southdowns Developer Limited as a plaintiff be dismissed accordingly and Paul Omondi Mbago do bear all costs of the said suit(s).

iv. The L.R No. 13154 Langata- Karen Nairobi do revert to the defendants and all the subsequent entries by the Registrar of Titles be cancelled and the Registrar of titles or any other party, body or person with mandate, power and authority in the Ministry of Lands do effect the said changes or cancellation and register the defendants as proprietors of L.R. No. 13154 Langata-Karen Nairobi.

v. The following suits be brought to this court for relevant orders as herein above where applicable.

a) H.C.C.C No. 6054 of 1991

b) H.C.C.C No. 1181 of 1992

c) Misc. Application No. 564 of 2014

d) H.C.C.C No. 564 of 2014

e) H.C.C.C No. 447 of 2008.

4. The application was premised on the ground that there was discovery of new evidence; the respondent had not been incorporated at the time the suit property was sold and when it instituted the suit in question. As such, the respondent lacked the capacity to hold title or file suit. The respondent opposed the application maintaining that it was incorporated on 9th November, 1989.

5. In his considered ruling dated 20th June, 2014, the learned Judge (Mutungi, J.) dismissed the said application. It is that decision that has provoked the appeal before us which is premised on the grounds

that the learned Judge erred in law and in fact in:-

- ***Arriving at a conclusion that the respondent was duly registered.***
- ***Finding that the appellants had not discovered new and important matters or evidence.***
- ***Determining that there was a proper temporary file on the respondent at the Registrar of Companies offices.***
- ***Finding that one Paul Omondi Mbago was a shareholder/director of the respondent.***
- ***Condemning the appellants to bear costs of the suit.***
- ***Finding the ledger kept by the Registrar of Companies was a register of the respondent.***
- ***Failing to find that the respondent had not paid or bid for L.R No. 13154.***
- ***Failing to find that the sale of L.R No. 13154 to the respondent was tainted with fraud, illegalities and was void ab initio.***
- ***Failing to find that the respondent was not in a position to transact or bid for L.R No. 13154.***
- ***Failing to find that James F. Kariuki Nganga T/A Ndarugu & Co. Merchants Auctioneers was not properly incensed to enable him auction the suit property as an auctioneer.***

6. The appeal was disposed of by written submissions and oral highlights. Mr. Kahuthu, learned counsel for the appellants, reiterated that the learned Judge failed to appreciate the discovery of new evidence, *to wit*, the respondent had not been incorporated during the auction and institution of the suit. He went on to add that the learned Judge not only failed to appreciate that the auctioneer who conducted the auction was not properly licensed but also failed to make a determination on the same effect in regard to the auction. Mr. Kahuthu urged us to allow the appeal.

7. In response, Mr. Kangethe, learned counsel for the respondent, submitted that the learned Judge summoned the Assistant Registrar of Companies who availed a certified copy of the respondent's certificate of incorporation. The Assistant Registrar confirmed that the respondent was incorporated in the year 1989. Counsel argued that the issue regarding the auctioneer was never raised before the learned Judge and was being raised for the first time in this appeal. Therefore, it ought to be disregarded by this Court. Nonetheless, the issues raised did not amount to discovery of new evidence since the auction took place over 20 years ago. Mr. Kangethe contended that the application for review should never have been entertained for the simple reason that the appellants had preferred an appeal against the judgment dated 29th April, 2013. As far as the respondent was concerned, the appeal lacked merit.

8. We have considered the record, submissions by counsel and the law. We, like the learned Judge, find that the appellants' application as well as this appeal turns on the single issue of whether there were grounds to warrant the review of the judgment dated 29th April, 2013.

9. ***Order 45 rule 1*** of the ***Civil Procedure Rules*** provides in part,

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. Emphasis added.

10. From the foregoing, as succinctly observed by this Court in Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2013] eKLR, an application for review and an appeal over the same decision are intended to be alternative remedies. A party cannot file an appeal and later seek review of the same judgment/ruling that is subject of the appeal. To allow such a scenario would expose the court to embarrassment.

11. It is not in dispute that the appellants' lodged an appeal against the judgment dated 29th April, 2013 and subsequently, filed the application seeking review. A similar situation arose in Kisya Investments Ltd. vs. Attorney General and R.L. Odupoy, Civil Appeal No. 31 of 1995 (unreported) in which this Court, expressed: -

“The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law. The correct position appears to us to be as set out by Sarkar on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows: The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end Review

application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with A review application is incompetent after appeal is preferred.”

12. Without adding more, we concur with the learned Judge, the fact that the appellants had lodged an appeal prior to filing the application seeking review rendered the review application incompetent. In our view, that was enough to dismiss the application and the learned Judge needed not to consider the merits of the application.

13. Consequently, we find that the appeal herein lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 6th day of October, 2017.

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