



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B. M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 6 OF 2017

BETWEEN

MAINGI MBINZU AND 314 OTHERS.....APPELLANTS

AND

COUNTY COUNCIL OF KITUI.....1ST RESPONDENT

SOUTH EASTERN UNIVERSITY COLLEGE.....2ND RESPONDENT

(An appeal from the Ruling/Order of The High Court of Kenya at Machakos (B. Thurairaja, J.) dated 15th December, 2015)

in

H.C.C.A. No.107 of 2010)

JUDGMENT OF THE COURT

The **315 appellants** were residents of three villages in Yatta Division of the then Kitui District – **Ndangani, Kikunguuni and Kamosi** of Mikuyuni Sub-Location, Kwa-Vonza Location. According to them a parcel of land known as **L.R. No. 13629** situate within Kwa-Vonza Location was trust land and was vested in the then **County Council of Kitui** to hold in trust for the appellants. They decided to assert this right - that they were the rightful owners of that parcel of land. They approached a law firm, **Messrs Kinyua Musyoki and Company Advocates** and instructed it to move to court. That led to the filing of a plaint at the High Court of Kenya, Machakos, where the appellants, as plaintiffs, sued the 1st and 2nd respondents (respectively **County Council of Kitui** and **South Eastern University College**) where, in addition to the above, it was stated that the 1st respondent had set apart the said parcel of land measuring about **10,000 acres** for use by **Ukamba Agricultural Institute** for purposes of use as a training institution. It was further stated that the said Ukamba Agricultural Institute had collapsed in the course of time and that the parcel of land had reverted to the 1st respondent and that, upon presentations by local leaders, the then **President of the Republic of Kenya** had directed that the appellants be settled on **9,500 acres** of the said land leaving **500 acres** to the collapsed institution. Further, that the appellants had been settled on the land where they had acquired proprietary rights and interests which should be protected by the Court.

The plaint went on to state that the 2nd respondent had been established on 15th July, 2008 as a constituent college of the University of Nairobi and that the said college had acquired the assets of Ukamba Agricultural Institute including, according to the appellants, 500 acres of the said parcel of land L.R. No. 13629 but that on 18th January, 2010 the 2nd respondent had published a notice in newspapers stating that it was the owner of the whole parcel of land. For all that the appellants prayed for various declarations and injunction – firstly, that it be declared that the appellants were proprietors of individual and distinct parcels of land comprising in aggregate about 9500 acres comprised in the title L.R. 13629; secondly, that it be declared that the 1st respondent always held the said parcel of land in trust for the appellants and should give effect to the appellants proprietary rights, interests and benefits by surrendering the land to be declared an adjudication section under the then Land Adjudication Act; thirdly, that it be declared that the 1st respondents’ (they probably meant the 2nd respondents) rights and interests were confined to 500 acres of the said parcel of land; that a permanent injunction be issued restraining the respondents and those acting or claiming under them from dealing in or interfering with the appellants’ rights over 9500 acres of the said land. The appellants also asked for costs.

The 1st respondent does not appear to have filed a defence and there is no evidence on record to show whether a default judgment was applied for or obtained by the appellants.

The 2nd respondent delivered a defence and counter-claim. The appellants claim was denied. The 2nd respondent went on to deny that the appellants were residents of the 3 villages as alleged in the plaint and denied that the parcel of land was trust land. At paragraph 7 of the defence:

“7. To the contrary, the 2nd defendant avers that L.R. No. 13529, the “suit land” (not 135629 as pleaded) was registered in favour Ukamba Agricultural Institute Ltd. on 4th October 1999.

7.1. The said grant was given by the 1st Defendant subject to the Provisions of the Trust Land Act, the Provisions of Town Planning Act and the Special Conditions contained in the Title.

7.2 Special Condition 5, 7, 8 and 9 of the Title provides that: - quote

5. The land and the buildings shall only be used for Agricultural Education purpose with stores and ancillary offices and the accommodation of the principal/head teacher.

7. The land shall not be used for the purpose of any trade or business which the local authority considered to be dangerous or offensive.

8. The grantee shall not subdivide the land without prior consent in writing of the Local authority and the Commissioner of Lands.

9. The grantee shall not sell transfer sublet charge or part with the possession of the land or any part thereof any buildings thereon except with the prior consent in writing of the local authority. No application for such consent (except in respect of a loan required for building purposes) will be considered until special condition No. 2 has been performed.”

In further defence the 2nd respondent denied that the entity called Ukamba Agricultural Institute had collapsed at all or that the parcel of land had at any time reverted to the 1st respondent. It was instead alleged in the defence that Ukamba Agricultural Institute was managed by Memorandum and Articles of Association and that, by legal Notice No. 102 of 2008 published on 15th July, 2008:

“.....all rights, liabilities and assets held by any entity on behalf of the said Ukamba Agricultural Institute Limited existing at the commencement of the said order, were automatically and fully transferred to the 2nd Defendant....”

and that the parcel of land was amongst those assets.

In the counter-claim the 2nd respondent stated that it had been established as a constituent college of the University of Nairobi through a Legal Notice; that it had acquired the assets of Ukamba Agricultural Institute including the said parcel of land; that the appellants had trespassed over the said parcel of land and had erected temporary structures without the 2nd respondents authority; that the 1st respondent had issued various warnings to the appellants to vacate the said land and finally, that the plaint disclosed no course of action, was defective and should be struck out.

The prayers in the counter-claim were a summary of what we have set out in the counter-claim. By Chamber Summons filed at the High Court in Machakos on 17th September, 2010 brought under the then Order XXXIX rules 1 and 3 of the Civil Procedure Rules (it is now number 40) the appellants prayed for injunction against the respondents to restrain them from entering the land L.R. 13529 or removing the appellants from that land pending hearing and determination of the application and thereafter determination of the suit. It was stated in grounds in support of the summons that the appellants had a good case with a probability of success; that they stood to suffer irreparable injury; that the balance of convenience tilted in their favour; that the respondents would suffer no prejudice if orders were granted and that there were weighty issues raised in the plaint which would be negated if injunction did not issue. There was an affidavit in support of the summons sworn by one of the appellants where the above grounds were repeated and other factual issues raised.

The 2nd respondent opposed the application through a replying affidavit sworn by its Principal, **Professor Geoffrey M. Muluvi**. He deponed amongst other things that there was no prima facie case made out by the appellants; that the suit by the appellants was apparently a representative suit yet no directions had been taken according to requirements of the Civil Procedure Rules; that the plaint was defective; that the 2nd respondent was in occupation of the land and was using the same for intended purposes; that the appellants were trespassers to the land who had been requested to vacate the land but had refused to do so and that the appellants had not shown a commonality of interests to bring or maintenance suit.

The 1st respondent filed grounds of opposition to the application through **Kalili & Company Advocates** even though it had not filed a defence.

The application was heard by **H.P. G. Waweru, J**, who, in a ruling delivered on 21st October, 2011 found that the parcel of land subject of the suit was registered in the name of Ukamba Agricultural Institute Limited and that, being so registered, the trust that the 1st respondent may have held over the land was extinguished upon registration of the land as private property. The learned Judge also found that the land as an asset of the said Institute had been transferred to the said respondent through a Gazette Notice and that the appellants were trespassers upon the land. The summons was dismissed and there was no appeal to those orders.

On 19th November, 2010, during the pendency of the said application, the 2nd respondent took out a Chamber Summons said to be brought under various provisions of law where it was prayed in the main that the plaint filed by the appellants be struck out and the court order for the immediate removal of the appellants from the land. It was stated in the grounds in support of the Motion that the suit as filed offended provisions of the Civil Procedure Rules; that the appellants had not verified the contents or the correctness of the suit or the verifying affidavit of one of the appellants **Muinde Musau** who had sworn affidavit; that the suit was defective and did not disclose a reasonable cause of action against the registered owner of land and that the appellants had no identifiable interest in law or otherwise over the suit property. The affidavit of Professor Muluvi in support of the application was to the same effect.

The appellants filed grounds to oppose that application where they stated *inter alia* that the application was bad in law and premature; that the application offended provisions of Civil Procedure Rules, 2010 and that the application should be dismissed with costs to the appellants. **B. Thurairaja Jaden, J.**, heard that application and had the benefit of reading the ruling of **H.P.G. Waweru, J.** which we have discussed in this judgement. The learned Judge found that the appellants had trespassed upon the 2nd respondents

land and had no identifiable interest in the suit property. The application was allowed with the consequence that the suit by the appellants was struck out and they were ordered to vacate the suit land.

A Notice of Appeal was filed against that ruling by **M/S J.K. Mwalimu & Co. Advocates** who had since come on record for the appellants. It appears at page 191 of the record of appeal.

On 11th August, 2014 new lawyers **M/S M. Njau & Mageto Advocates** who had replaced M/S J.K. Mwalimu & Co. Advocates filed a Notice of Motion at the said High Court where it was prayed, in what is material for this appeal, that the court be pleased to review and/or vary or set aside the ruling and order given on 25th September, 2013. In the grounds in support of the Motion the appellants stated, amongst other things, that their suit had been ordered struck out upon application by the 2nd respondent; that the appellants were dissatisfied with that ruling but had not appealed (we observe here, as already stated, that a Notice of Appeal against the ruling made on 25th September, 2013 had been lodged by M/S J. K. Mwalimu & Co. Advocates for the appellants and bears a court stamp of 8th October, 2013); that there was an error apparent in the face of the record because the courts stated-

“... and the law in that the ruling dated on 25th September 2013 although based on an application by the second defendant dated 19th November 2014 (sic) appeared like a summary judgment which was not sought for by the second defendant in its application directing for an eviction without hearing the plaintiffs case on merits.....”

It was further stated that there was another error apparent on the face of record in that the subject matter of the suit was land but that matter had been heard by a Judge of the High Court instead of a Judge of the Environment and Land Court. Also, that there was yet another error – that the ruling and the order extracted therefrom did not state the title number of the land from which the appellants were to be evicted. It was therefore stated that the appellants had been condemned unheard and that the appellants had been evicted from the suit property in October 2013 and that the eviction was done ***“... in the most in (sic) human way and unconstitutionally...”*** An affidavit in support, sworn by the 26th appellant, repeated those grounds.

Professor Muluvi swore a replying affidavit in opposition to that Motion. What he says in that affidavit is now common ground and we need not reproduce it here.

Lady Justice Jaden, who had struck out the suit, heard the Motion for review or setting aside of her ruling. In a ruling delivered on 15th December, 2013 the learned judge considered the provisions of Order 45 Civil Procedure Rules and found that what the appellants were asking her to do was not to review her ruling but to sit on appeal against her ruling, something the law did not permit her to do. On the issue that the ruling did not state the specific suit land from where the appellants were to be evicted the learned Judge was of the view that the suit land was reflected in the plaint and that the ruling referred to the suit land. On whether she had jurisdiction to entertain the suit the learned Judge held that the parties had submitted to jurisdiction and the issue could not be taken again before her. In the end the learned Judge found no merit in the Motion which she proceeded to dismiss. A Notice of Appeal followed challenging the whole decision and that is the subject of the appeal before us.

There are 11 grounds of appeal set out in the Memorandum of Appeal drawn for the appellants by their advocates, Messrs M’Njau and Mageto, Advocates. The learned judge is faulted for finding that granting orders prayed for would have amounted to sitting on appeal against her decision; for refusing to review an order which is said to have been ambiguous for not specifying the title number of the land subject of the suit; for failing to review the order on eviction; for failing to find that not being a Judge of the Environment and Land Court she had no jurisdiction to hear the matter; that the ruling was not well reasoned; that the learned Judge failed to exercise judicial discretion to give orders in review; that wrong principles of law were applied by the learned Judge and, finally, that the learned Judge had erred in law and fact and had reached wrong conclusions.

When the appeal came up for hearing before us on 5th October, 2017 there was on record an application

by the 2nd respondent praying that Notice of Appeal and the appeal itself be struck out for reasons set out in the Motion.

The appellant and the 2nd respondent had filed written submissions on the main appeal as directed in a case management conference held earlier when a hearing date was given. In view of this, the 2nd respondent did not prosecute the said Motion. We instead heard the appeal.

Mr. Elijah Bitange Mageto, learned counsel, appeared for the appellants while learned counsel **Miss Miriam Onsongo** appeared for the 2nd respondent. The 1st respondent was not represented and, as we have seen, had taken very little interest in the proceedings in the High Court where it had not even filed a defence.

In submissions before us, learned counsel for the appellants was of the view that the learned Judge of the High Court was wrong to hold that she had jurisdiction to entertain the suit which suit, according to learned counsel, should have been heard by a Judge of the Environment and Land Court. According to counsel, this was an error apparent on the face of the record and the appellants were entitled to orders in review. Learned counsel concluded by faulting the learned judge for finding no error on the record when the ruling had not specified the suit land from which the appellants were to be evicted.

It was then Miss Onsongos' turn. Learned counsel submitted that Order 45 Civil Procedure Rules on review did not allow a party to pursue 2 remedies – filing an appeal and applying for review at the same time. Learned counsel submitted that in the absence of a withdrawal of the Notice of Appeal that had been filed by the appellants, the proceedings for review that followed were irregular. Further, that the errors alleged by the appellants in the review application were not self-evident and required elaborate argument. On whether or not the ruling or order had any ambiguity it was Miss Onsongos' view that there was only one property at issue in the suit and that, in any event, had there been ambiguity, which she denied, complaint should be by the 2nd respondent, not the appellants. Learned counsel concluded her submissions by stating that an order to strike out pleadings should issue in appropriate cases and she defended the learned Judge for striking out the suit where the 2nd respondent had shown to the required standard that it owned the suit land and the appellants had no identifiable interest in the same.

What was before the learned Judge was essentially an application for review. The learned Judge was being asked to review the ruling and orders she had made when she ordered the appellants' suit to be struck out whose effect would lead to the eviction of the appellants from the suit land.

The learned Judge considered the application before her and reviewed past cases on the point particularly **Nancy Wangari & 5 others v Michael Mungai** [2014] eKLR where this Court considered what constitutes an error on the face of the record. The learned Judge reached the conclusion that no error had been identified to entitle her to review her ruling and, in the event, the motion failed.

This Court has had occasion such as in the above case and other cases to pronounce itself on how a trial Judge who is asked to review his ruling should approach such an application and the principles to apply in determining the application. Order 45 Civil Procedure Rules 2010 provides for review of judgements, rulings or orders and is to the following effect:

1. (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 decreed or made the order without unreasonable delay.”

The said Order 45 is speaking to the party who has an adverse order from a judgement or order from which an appeal is allowed but who has not filed an appeal, or a party aggrieved by a decree or order from which no appeal is allowed. If that party discovers new and important matter or evidence which, while always being diligent, was not within his knowledge or could not be produced by him when the decree or order was made; or if there is an error apparent in the face of the record; or for any other sufficient reason – such a party may apply for review of the judgment or order. The application is to be made to the court that passed the decree or made the order and all these must be done expeditiously without unreasonable delay.

The prayer in the Motion before the learned Judge for review asked:

“That the Honourable Court be pleased to review and or vary and or set aside the ruling and order given on 25th September 2013.”

The learned Judge considered the application and reached the conclusion that there was no error apparent on the face of the record.

What constitutes an error on the face of the record cannot be defined precisely or conclusively. It must be left to be determined judicially on the peculiar facts of each case. This is what this Court had to say on ***“error apparent on the face of the record”*** in **Nyamogo and Nyamogo Advocates v Kago** [2001] IEA 173:

“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 a long drawn process of reasoning or on points where there may be 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal.”

It was held by this Court in **National Bank of Kenya v Ndungu Njau** CA 211 of 1996 (ur) that the error or mistake must be self-evident and should not require an elaborated argument.

The appellants in this appeal complain that the learned Judge struck out the appellants’ suit and, in so doing, appeared to deal with the issue as if it was a summary judgement application, not an application to strike out the suit. We cannot find merit in this argument. The appellants filed a suit claiming rights to land but it was demonstrated by the 2nd respondents’ to the satisfaction of the court that the 2nd respondent was the registered owner of the land and was in occupation of the same. When the appellants had moved the trial court for orders of injunction to stop the respondents from evicting them Waweru, J. had found that the appellants were trespassers without any identifiable rights or interests to the land at all. There was no challenge to that ruling or those findings at all.

Jaden, J., who heard the application for review, did not find any error apparent on the face of the record. She held, correctly, we think, that the appellants would have appealed the orders striking out the suit, not move the court for review.

On the complaint that the learned Judge, who was not an Environment and Land Court Judge, lacked jurisdiction, that argument cannot hold. The parties submitted to jurisdiction of the High Court and the appellants did not question jurisdiction of the trial court at all but submitted to that jurisdiction by filing the suit in the High Court and continuing the suit in that court.

The learned Judge exercised her discretion and found no merit in the application for review. Miss

Onsongo, learned counsel for the 2nd respondent invites us to the view that we should not interfere with exercise of that discretion. **Madan, JA.** in **United India Insurance Company Limited & Oriental Fire and General insurance Company Limited v East African underwriters (Kenya) Limited** [1982-88] IKAR 639 held that this Court should not interfere with the exercise of discretion of a trial Judge unless that Judge misdirected himself on law, or fact, or that he took into account considerations which he should not have taken into account or that he failed to take account of considerations which he should have taken account or, finally, that the decision, though a discretionary one, was plainly wrong. The appellants have not shown that the learned Judge fell short of any of those considerations.

The appellants, in this appeal, did not satisfy the provisions of Section 80 Civil Procedure Act as elaborated in Order 45 Civil Procedure Rules. As we have shown, they filed an appeal against the ruling striking out the suit. Section 80 of the said Act and order 45 of the said Rules did not permit the appellants to file an appeal and at the same time apply for review of the said ruling. The two remedies could not be taken simultaneously and the appellants were required in law to file an appeal or apply for review. They could not do both.

The final complaint – that the ruling was ambiguous as it did not specifically state the title number of the suit property – has no merit. The applicants moved the court by plaint where the suit property was identified and specifically stated. The dispute between the parties related to that property. The application to strike out the suit was brought in that suit and there was no dispute or ambiguity on the property the parties were fighting about.

We find no merit in this appeal and we order it be and is hereby dismissed with costs to the second respondent.

Dated and delivered at Nairobi this 15th day of December, 2017.

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR