IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, OKWENGU & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 290 OF 2009

BETWEEN

CHRISTOPHER KAGEMA GICHUHI.....APPELLANT

AND

LIVINGSTONE GITOME KOHIGUKA.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Khamoni, J) dated 13th December, 2007

in

H.C.C.C. NO. 412 of 2002)

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JUDGMENT OF THE COURT

Background

1. This is an appeal from the ruling of the High Court (Khamoni, J) dated **13th December, 2007** wherein the court dismissed the appellant's application for review.

2. The genesis of this matter goes back to a plaint dated **7th March 2002**, in which the appellant sought several orders against the respondent including an order of injunction restraining the respondent from trespassing on ***L.R NO. NGONG/NGONG 5862*** [the suit property]; an injunction restraining the respondent from selling, alienating, disposing of, mortgaging, charging and or in any way encumbering any part of the suit property; an eviction order against the respondent, his agents, servants and or assignees and mense profits from the date the trespass commenced until the respondent vacates and delivers vacant possession of the suit property to the appellant.

3. The respondent filed a defence on 2nd April, 2002 denying the allegations levied by the appellant. The respondent contended that the matter was *res judicata* as the same had been adjudicated on by the Land Registrar, Kajiado and a ruling on the dispute made on 27th July, 1999. The appellant filed an appeal against the said ruling in the High Court, being Nairobi HCCA No. 322 of 1999 which was subsequently withdrawn.

4. At the hearing of the suit, learned counsel for the respondent raised a preliminary objection arguing that a case based on trespass should be filed before the Land Dispute Tribunal in accordance with section 3 of the Land Disputes Tribunal Act. Consequently, the suit, according to counsel was incompetent as the High Court had no jurisdiction to grant the prayers sought by the appellant. The learned Judge on 19th March, 2007 found that the matter was not *res judicata* and that the appellant's claim was a clear case of trespass under section 3 of the Land Disputes Tribunal Act. The learned Judge upheld the respondent's preliminary objection and struck out the appellants plaint with costs to the respondent.

5. Aggrieved by the said ruling, the appellant filed a motion dated 21st May, 2007 seeking to have the orders made on 19th March, 2007 reviewed, set aside and the plaint dated 7th March, 2002 reinstated on the ground that the said ruling was based on mistakes or errors of law and facts on the face of the record. The appellant through its counsel argued that ***section 3 of the Land Disputes Tribunal Act*** does not oust the jurisdiction of the High Court and that the preliminary objection raised by the respondent was an ambush as he was not availed adequate notice to prepare for the same. By a ruling dated 13th December, 2007, the learned Judge dismissed the appellant's application for review. In disallowing the application, the learned Judge found that the mistakes or errors of law and facts on account of which the application had been brought were not in reality apparent on the face of the record as claimed by the appellant and that the appellant ought to have appealed against the ruling instead of filing a motion for review.

6. Aggrieved by that decision, the appellant has preferred this appeal which is based on thirteen (13) grounds, the main ones being that:

i. *The learned Judge erred in Law and fact when he upheld the respondent's counsel's argument that all matters pertaining to tresspass on land are exclusively reserved for the Land Dispute Tribunal Act No. 18 of 1990.*

ii. *the Learned Judge erred in the law and fact when he failed to find that the respondent's counsel had apologetically abandoned and or withdrawn the first basis/ground of his preliminary objection, when he admitted that there had not been any dispute between the parties hereto before the Land Dispute Tribunal, in which the latter had ruled against the appellant.*

(iii)Further, the learned Judge erred in law and facts when he upheld the respondent's preliminary objection inspite of the fact that the respondent's counsel had also abandoned the second ground of his preliminary objection that is to say the plea of "Res judicata".

(iv) The learned Judge erred and misdirected himself in law and facts when he upheld a preliminary objection which the respondent had fully withdrawn and or irretrievably abandoned in the course of his presentation.

v. *The learned Judge erred in law when he failed to direct his mind to the legal and factual issues before him namely, whether: the superior court has or has no original jurisdiction on the question of trespass on registered land as was the case before him; and secondly, whether the appellant's plaint dated the 7th March 2002, constituted an abuse of the process of the court.*

(vi) The learned Judge erred and misdirected himself in law when he struck out the appellant's plaint dated 7th March, 2002, without giving reasons for his ruling/order.

(vii) The learned Judge's refusal to set aside his ruling dated 19th March, 2007 and reinstate the plaintiff's plaint dated 7th day of March, 2002, on the ground that the appellant's counsel did not complain of an ambush is not supported by evidence on record.

Submission by counsel

7. At the hearing of this appeal, Mr Frank Nabutete, learned counsel for the appellant submitted that the creation of a Land Disputes Tribunal does not oust the High Court's jurisdiction to hear and determine

issues of trespass of land; that there are in existence two plots of land being L.R No Ngong/Ngong 5862 which is registered in favour of the appellant and L.R No. Ngong/Ngong 3132 which belongs to the respondent; and that the two pieces of land are not adjacent but are separated by a road measuring 60ft wide. Counsel argued that the learned Judge was wrong to conclude that the High Court no longer has jurisdiction to deal with questions of trespass; that the jurisdiction of the High Court is stipulated in ***Article 165 of the Constitution***; that ***Section 159 of the Registered Land Act*** [now repealed] gives the High Court jurisdiction to deal with issues of trespass; that part of that jurisdiction can be exercised by the Magistrate's court. Counsel submitted that the decision denying the review and striking out of the plaint on grounds that the matter should have been heard and determined by the District Land Tribunal should be set aside and prayers sought, granted.

8. In opposing the appeal, Mrs Kayugira who was holding brief for Mr. Kanyi, learned counsel for the respondent submitted that the only ground that was rightly before this court relates to the learned judge's refusal to set aside his ruling dated 19th March, 2007 and reinstate the plaintiff's plaint dated 7th March, 2002; that the appellant's counsel did not complain of an ambush is not supported by evidence on record; that all the other grounds are an appeal from the ruling of **19th March, 2007** and not the impugned ruling of 13th December, 2007; that in the affidavit sworn by the appellant on 21st May 2007, the appellant for the first time brought out new facts relating to the fact that there were two properties belonging to the appellant and the respondent rather than one suit property. Counsel urged us to dismiss the appeal as the grounds relied on by the appellant related to the ruling of **19th March, 2007** which ruling had not been appealed against.

Determination

9. We have carefully considered the pleadings, submissions by counsel and the law. In considering this appeal, it is important for us to point out that the appeal relates to the dismissal of the application dated **21st May, 2007.** In the said application the applicant sought for an order for review and setting aside of the High Court's ruling dated **19th March, 2007** which struck out his plaint dated **7th March 2002**.

10. The issue before us is whether the learned Judge was justified in dismissing the application seeking review of his earlier ruling. This Court in ***MULEMBE FARM LIMITED & ANOTHER V JOHN B. MASIKA & 3 OTHERS, Civil Appeal No. 230 of 2004***, expressed itself on the issue of review as follows:

> ***"The appeal before us is against a ruling on a review application, and the factors which guide the court on a review application are set out in the relevant provisions on review. …Those factors are, firstly, that an applicant must show that there exist new and important matter or evidence which after exercise of due diligence were not within his knowledge or could not be produced at the time the decree or order was made. Secondly, and in the alternative, that there is some mistake or error apparent on the face of the record. …***
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> ***The power of review is not the same as the power exercisable on appeal. That is why the jurisdiction of the court in review is circumscribed. The court in a review is called upon to exercise discretion in a situation where, if the power is not exercised injustice or hardship will result and is invoked to help a party who is shown to have taken all essential steps in a matter but because of factors beyond his control he was not able to avail all relevant material or evidence, or that an error or mistake occurred."***

11. The appellant in his application for review contended that the ruling dated **19th March, 2007** was based on mistakes or errors of law and facts on the face of the record. That the fact that there are two pieces of land involved, one belonging to the appellant and the other to the respondent which are separated by a road and do not share a boundary was not disclosed to the court. For an application for review to succeed, the evidence must not only be new but the applicant must prove that he did not have the evidence or knowledge in his possession at the time of hearing and could not have obtained it at the

time. The learned Judge in dismissing the appellant's application for review stated:

> ***"… I am of the view that what the applicant has told me in this application are matters or evidence which, after the exercise of due diligence, was within his knowledge or could have been produced by him at the time when the ruling/order dated 19th March, 2007 was made I could even have [sic] granted him an adjournment to go and have a better preparation had be complained (which he did not) that he was being [sic] ambushed."***

12. From the evidence on record, we agree with the learned Judge that the appellant was a party to the proceedings before the High Court and therefore cannot now rely on facts and evidence that were previously within his knowledge. In view of the foregoing, we are in agreement with the ruling of the learned Judge and find no reason to interfere with the same.

13. The appellant has also contended that the learned Judge was wrong in holding that the High Court has no jurisdiction to deal with issues of trespass.

We find that what is before us is an appeal against the ruling dated 13th December, 2007 and not the ruling dated 19th March, 2007 wherein the learned Judge found that the High Court had no jurisdiction to deal with issues of trespass. There is no appeal before us against the ruling of 19th March, 2007.

14. Based on the above reasons, we find that this appeal has no merit and it is dismissed with costs.

Dated and delivered at Nairobi this 19th day of May, 2016.

ALNASHIR VISRAM

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR