IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 210 OF 2014

BETWEEN

PETER KIRIKA GITHAIGA...1ST APPELLANT

LUCY WANJA KANGETHE...2ND APPELLANT

AND

BETTY RASHID..RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Gacheru, J.) dated 21st March, 2014

in

H.C.C. S. No. 529 of 2013.)

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JUDGMENT OF THE COURT

The background to this appeal is that the proceedings in the High Court were commenced by way of an originating summons dated 7th May, 2013. In that summons the appellants sought an answer to the question whether the High Court could issue a permanent injunction to restrain the respondent from interfering with, alienating, transferring, disposing and or dealing with the property known as **Plot No.A14** within **L.R. No. 6845/124 Utawala**, "*the suit premises*" in any manner adverse to their proprietary interests.

The appellants' case was that on or about 5th February, 2007, the 1st appellant purchased the suit premises on behalf of his wife, the second appellant, from one **Mbugua Mburu** at a consideration of Kshs.190,000/-. Mbugua Mburu was then a shareholder of **Mathare Kuarahuka Witeithie Uteithio Investment**, the registered proprietor of the original parcel of land out of which the suit premises were curved. Pursuant to the purchase, the appellants commenced the development of the suit premises by erecting a perimeter fence. However, in no time, the fence was pulled down by the respondent. The respondent thereafter constructed a house thereon. Efforts by the appellants to stop the construction bore no fruit, hence the suit in the High Court.

On her part, the respondent claimed that on 7th January, 1991, she bought the suit premises from Mathare

Kuarahuka Witeithie Uteithio Investment for Kshs.12,000/-. She thereafter took possession thereof and constructed a house and had since enjoyed quiet, peaceful and uninterrupted occupation of the same. She was therefore unpleasantly surprised when on 4th June 2012, she received a letter from the appellants' lawyers informing her that the appellants were claiming ownership of the suit premises.

As a result of the confusion as to the ownership of the suit premises, the appellants initiated investigations into the matter by the Directorate of Criminal Investigations "*D.C.I*". According to the appellants the investigations revealed that the respondent's name and identity card had been superimposed on another person's certificate of allotment which was fraudulent. However, the investigating officer, one, **Inspector Kibet** could not release the investigation report to the appellants in the absence of a court order to that effect.

On the basis of this information, the appellants filed a motion on notice seeking an injunction to retrain the respondent from dealing with the suit premises in a manner adverse to their proprietary interests and an order directing at the D.C.I to produce the Document Examiner's report in respect of the respondent's purported certificate of allotment. As expected the application was opposed by the respondent. In a ruling dated and delivered on 8th October, 2013, **Gacheru, J.** determined as follows:-

> **"...In the instant case, I find that there are serious conflicts of facts which can only be decided after a trial. For that reason, I will order the maintenance of Status Quo in the following terms.**
>
> > **a) Pending the hearing and determination of the main suit, none of the parties herein should interfere, alienate or have any dealing on the suit property.**
> >
> > **b) The plaintiff to set the main suit for hearing within a period of 12 months from the date of this Ruling. Failure to do so, the Status Quo orders will automatically lapse and be discharged.**
> >
> > **c) The court declines to allow the applicants prayer No.4 as those are documents to be exchanged or obtained during discoveries of documents....."**

Unhappy with the last order (c) above, the appellants on 29th October, 2013 filed an application seeking a review of the court's ruling limited to order (c) above and that following the review, the D.C.I be ordered to produce the investigations report. The grounds advanced in support of the application were that the Document Examiner's report could not be discovered as it was not in possession of the appellants. That the report was in possession of the D.C.I and could only be released pursuant to a court order. That such an order was in line with the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of the dispute.

The application was once again opposed by the respondent on the grounds that it was misconceived, frivolous and an abuse of the court process as it had not met the threshold required under **Order 45 Rule 1** of the Civil Procedure Rules. That though the appellants were seeking an order of review, they had failed to annex to the application the order sought to be reviewed. That the person against whom the order is directed was not a party to the suit and to allow the application will be tantamount to inviting the court to investigate the case on behalf of the appellants and also to involve a civil court in a matter that was not before it.

In a ruling delivered on 21st March, 2014, Gacheru, J. held that:-

> **"..the applicants herein have not shown that there has been discovery of new and important matter of evidence of error apparent on the face of record or any other sufficient reasons to warrant a review of the Court's Ruling of 8/10/2013.**
>
> **Consequently, I find the applicants' application dated 28/10/2013 is not merited. The same is**

dismissed entirely with costs to the Respondent..."

It is this ruling that has spurred this appeal on grounds that an order of review can be entertained for "*any other sufficient reason*", that non extraction of the order sought to be reviewed was not fatal to the application, that the process of discovery had changed fundamentally and, hence the inability to comply with the court's ruling of 8th October, 2014. That the court failed to appreciate that the D.C.I was not a party to the suit and the only way the evidence sought could be procured was through an order of the court and finally that the court misdirected itself in not appreciating efforts expended by the appellants to seek as much as possible evidence that could assist it in arriving at a just decision in sync with the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

The appeal came for directions on 10th August, 2016 before **Sichale, J.A**. for case management conference who directed that parties file and serve their respective written submissions before the hearing date which she scheduled for 28th October, 2016. Come the date and only the appellants had filed their written submissions. The respondent had not and instead opted to make oral submissions. In their written submissions, the appellants reiterated that an order of review can be entertained for any sufficient reason quite distinct and a part from there being an error of law apparent on the face of the record, or discovery of new and important matter of evidence which the appellants could not by exercise of due diligence have placed before a Judge when she entertained the earlier application. In aid of this submission, **Mr. Kirika**, learned counsel for the appellants, referred us to the case of **Mbogo v Muthoni & Another [2006] 2 KLR 199** where it was held that any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered discretion given to the court by **Section 80** of the Civil Procedure Act. With regard to failure by the appellants to annex to the application the order sought to be reviewed, counsel submitted that such failure was not fatal to the application. That in any event such failure is easily curable by the provisions of **Article 159(2)** of the Constitution of Kenya and further by the overriding objective of the court as captured by **Section 1A** of the Civil Procedure Act. In support of these propositions, the appellants called in aid the cases of **Hunker Trading Company Limited v Elf Oil Kenya Ltd, Civil Appeal No. 6 of 2010** and **Caltex Oil Limited v Evanson Wanjihia, Civil Application No. NAI 190 of 2009 (UR)**. In conclusion, the appellants submitted that the process of discovery had been done away with, with the advent of the Civil Procedure Rules 2010 and replaced with **Order 11**. It was therefore a misdirection for the court to refer the appellants to the discovery process. In any event the suit had been commenced by way of originating summon and was therefore not subject to Order 11.

Opposing the appeal, **Ms Atetwe**, learned counsel for the respondent, submitted that the appeal was incompetent in accordance with the provisions of **Order 43** of the Civil Procedure Rules, that the court below was right in refusing to grant the application for review since the appellants had failed to satisfy the grounds for review and lastly that failure by the appellants to annex the order sought to be reviewed on the application was fatal to the entire application.

We have considered the rival submissions by counsel and examined the record of appeal before us and the appellants' list of authorities. Whether or not to allow an application for review is in itself an exercise in discretion by the trial court although some of the grounds upon which such an exercise should be undertaken has been set out in **Section 80** of the Civil Procedure Act and **Oder 45 Rule 1** of the Civil Procedure Rules. The Supreme Court of Uganda defined exercise of discretion as the faculty of deciding or determining in accordance with circumstances and what is deemed to be just, fair, equitable and reasonable in those circumstances. See **Kiriisa v Attorney General [1990-1994] EA 258**. In the case of **George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another, Civil Appeal No. 72 of 2014 (UR)**, we expressed ourselves on the issue thus: -

> **"...Subject to the requirement that discretionary power must be exercised judiciously, this Court will be slow to interfere with the exercise of discretionary by a judge of the High Court."**

In **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 895 Madan**

J.A. (as he then was) stated the principles in these terms:-

> **"...the Court of Appeal will not interfere with discretionary decision of the Judge appealed from simply on the ground that its members if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account, or fifthly, that his decision albeit a discretionary one is plainly wrong."**

The rationale for that cautious and circumscribed approach by the appellate court was succinctly stated by **Justice Ibrahim Tank Mohammad** of the Supreme Court of Nigeria in **Abayomi Babatunde v Pan Atlantic Shipping & Transport Agencies Ltd & Others, S.C. 154/2002** as follows:-

> **"The general law on exercise of discretion is that the discretion is always that of the trial court and not of the appellate court. Hence an appellate court cannot substitute its own discretion."**

In declining to grant the order for review, Gacheru, J. reasoned that the order sought to be reviewed was not attached to the application which was a fatal omission, that **Order 45 Rule 1** of the Civil Produce Rules apply where there is a discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the appellant at the time the order was made and that in the circumstances of this case, the appellants had not proved any of the above perimeters, nor was there any other sufficient reason. That the court had considered the same prayer now being sought by way of review in its earlier ruling on the application for injunction and refused to grant it with reasons. Therefore, by bringing the application for review and asking the court to grant the same prayer that was disallowed was tantamount to inviting the court to sit on appeal of its earlier decision.

Other than the decision on the effect of failure to annex the order sought to be reviewed to the application, we do not discern any other misdirections in law, misapprehension of facts, consideration or non-consideration of material facts nor is the ruling, plainly wrong on the face of it. The learned Judge clearly took into account and considered what was relevant for this kind of application. She exercised her discretion judiciously and we see no reason at all to fault her. The appellants have nonetheless faulted the Judge for limiting her consideration of the application on two grounds only; discovery of new and important matter or evidence and mistake or error apparent on the face of the record, yet a review could be ordered "*for any other sufficient reason*." That the appellants had advanced other sufficient reasons to warrant the grant of the application being the fact that the Document Examiners' report could not be discovered since it was in the possession of the D.C.I and further that such an order was in line with the overriding objective of the court.

Contrary to the submissions of the appellants, the court towards the tail end of its ruling did consider whether or not there were any other sufficient reasons to warrant a review and found that there were none and rightly so in our view.

Rules of **Order 45** anticipates that indeed there may be other sufficient reasons, quite apart and distinct from an error of law apparent on the face of the record or discovery of new and important matter which the appellant could not by exercise of due diligence have placed before the Judge when she made the earlier order. However, we doubt whether the fact that the appellants did not have in their possession, the Documents Examiner's report or the overriding objective would amount to any other sufficient reason to warrant an order of review. The appellants may as well call the Document Examiner as a witness. We think that by the appellants asking the court to compel the D.C.I to produce the report, they were asking the court to descend in the arena of conflict which the court should at all times avoid. Further, it does appear to us that by making the application, the appellants were seeking the court's assistance in fishing for, gathering or retrieving evidence, hardly the role of the trial court in Civil Proceedings. It does not

matter that the report was in possession of a third party. The fact that such a third party cannot participate in the discovery proceedings is no reason or sufficient reason for an order of review when he can easily be called as witness. Nor is it a consideration that interrogatories and discovery were inapplicable in the circumstances of the case. Further, even if the learned Judge was wrong on that score, that can only form a ground of appeal and not review. Indeed, the manner in which the application was canvassed before the learned Judge left no doubt at all that the Judge was being asked to act as appellate court on her own ruling. No wonder the Judge quipped that by bringing the application and seeking a prayer that had been denied was tantamount to inviting her to sit on an appeal of her own decision.

We doubt whether overriding objective of the court *per se* can be a sufficient reason in application for review. It cannot be used to fish for evidence against the adverse party. As stated in the case of **Hunker Trading Co. Limited** (*supra*), the principal purposes of the double "OO" is to enable the court to take case management principles to the centre of the court process in each case coming before it, so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap. It is a case management principle that should be fair to all parties to the suit. It cannot be invoked unjustly as to prejudice the other party.

On the question whether failure to extract and annex the order or decree sought to be reviewed in an application for review, save for the case of **Sadrudin Kurji & Another v Shalimar Limited & 2 Others [2008] eKLR**, where this Court held that such an omission is not fatal, **t**he Court of Appeal does not appear to have had much occasion to voice itself on the matter.

But from the various decisions rendered by the High Court, the resolution on their part seems unanimous, that an application for review is fatally defective if the order sought to be reviewed is not attached. While no provision of the law makes this a requirement, some of the reasons advanced by the High Court are that inclusion of the order is mandatory so as: to enable the court to determine the impugned point (per **Visram, J.** as he then was) in **Wilson Saina v Joshua Cherutich t/a Chirutich Company Ltd [2003] eKLR**; and **f**or there to be clarity as to what "aggrieves the applicant", **(Lesiit, J.** in **Belgo Holdings Limited v Robert Kotich Otach & Another [2009] eKLR**). Similar sentiments are expressed in various other cases such as **by Mutungi, J.** in **Suleiman Murunga v Nilestar Holdings Limited & Another [2015] eKLR.** However, in the case of **Rose Njeri Muiruri v. James Kiiru Chege & Another [2009] eKLR***;* **Kasango, J.** veered off the High Court path and held that failure to attach the order is not fatal at all.

In our view, the position espoused by this Court and by Kasango J., represents the correct position, as they allow for recognition of the fact that while the law does not expressly demand that the order/ decree be attached, it is at times necessary that the same be extracted for purposes of enabling the court have clarity as to the orders complained about.

Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated **Order 45 (1)** does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.

All said and done and save for the above aspect, we are satisfied that this appeal lacks merit. It is accordingly dismissed with no order as to costs.

Dated and delivered at Nairobi this 25th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR