IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 281 OF 2011

BETWEEN

RICHARD OMARI NYAMATURA…….…….APPELLANT

AND

DANIEL OMBACHI MOGENI…….....RESPONDENT

(Appeal from the Ruling of the High court of Kenya at Kisii (Makhandia, J.)

dated 23rd September, 2011

in

HCCC. NO. 349 OF 1996)

****

JUDGMENT OF THE COURT

This an appeal against the ruling and order of the High Court (***Makhandia J***., as he then was) made on 23rd September, 2011 wherein the learned Judge, on a preliminary objection, struck out the appellant's application for review. The preliminary objection, which was upheld, was to the effect that the High Court had become ***functus officio*** as the application for review was ***res judicata***.

The dispute herein can be traced to a plaint filed on 8th November, 1996 by the appellant ***Richard Omari Nyamatura***, against the respondent ***Daniel Ombachi Mogeni***, in the High Court at Kisii. In that suit the appellant prayed for the following reliefs:

> ***(a) Permanent injunction to restrain the defendant, his agents or servants from in any way interfering with the plaintiff's quiet enjoyment of his plot or parcel of land known as West Mugirango/Siamani/2257,***
>
> ***(b) General damages,***
>
> ***(c) costs of and incidental to this suit,***
>
> ***(d) Any other relief that the court could deem fit to grant."·***

Appurtenant to the plaint, the appellant lodged an application by way of Chamber summons seeking an order of temporary injunction. The respondent opposed the application by way of a replying affidavit and the application was listed for hearing on 4th December 1996. Come that day, the parties through counsel recorded the following consent order:-

> **"By consent the District Surveyor Nyamira to visit the disputed land parcel Nos. 2257, 2178 and 2256 and mark the boundaries. Any party who is found to have encroached on another's land, to vacate same forthwith. Interim orders to remain in force until 6.1.97 when matter will be mentioned."**

The report of the District Surveyor- Nyamira was, on 24th March, 1997 read in the presence of the appellant and counsel for the respondent. The surveyor made the following findings:-

> *" (1) Parcel No. 2257 is neither occupied by the plaintiff nor the defendant and it measures 0.134 ha approximately.*
>
> *(2) Parcel No. 2178 measures 0.200 Ha and is occupied by the defendant.*
>
> *(3) Parcel No. 2256 is occupied by both the defendant and the plaintiff. The plaintiff occupies the area marked red in the enclosed map and measures 0.03 Ha approx. and has constructed a permanent house block there. The rest of the area measures about 0.317 Ha is occupied by the defendant."*

After making those findings, the surveyor made the following recommendation:-

> ***"The case to be referred to arbitration before a final report is written. If it is found that the map is erroneous the same can be corrected by the Land Registrar Nyamira District"***

The above report was adopted as a judgment of the court on 24th April, 1997. Given finding No.3 of the surveyor, it was the appellant who was occupying a portion of the respondent's parcel number West Mugirango/Siamani/2256. In terms of the consent order reproduced above; the appellant was liable to be evicted therefrom.

The appellant was aggrieved by that judgment and sought its review mainly under ***Order XLIV (now Order 45) of the Civil Procedure Rules***. The respondent resisted the application and it was dismissed on 13th August, 1997.

Being aggrieved, the appellant lodged Kisumu Court of Appeal Civil Appeal Number 35 of 1998 which appeal was, on 22nd June, 1998 struck out for being defective. The appellant sought to restart the appeal process afresh when he lodged an application at the Court of Appeal at Kisumu for extension of time to lodge an appeal against the order refusin g review of the same judgment by which Nyamira District Surveyor's report had been adopted. The application for extension of time was listed for hearing before ***Akiwumi JA***, (as he then was) on 24th November, 2000. The learned Judge made the following order:-

> ***"ORDER***
>
> ***The application does not comply with Rule 13(4) and (5) of our Rules regarding the consecutive numbering of pages and the indication in the margin of all the pages of each tenth line. For these reasons the application is struck out with leave for the applicant to file a proper application. The respondent will have today's costs assessed at 2000/= to be paid within 7 days otherwise execution to issue.***
>
> ***Made at Kisumu this 24h day of November, 2000***
>
> ***A.M. AKIWUMI***

JUDGE OF APPEAL"

It would appear that the appellant abandoned the appeal option. He made several applications some of which sought to resist execution of the said judgment. Eventually however, he was evicted from land parcel number, West Mugirango/Siamani/2256 and his houses demolished pursuant to orders issued on 10th November, 2008.

The appellant was not done yet. By his application dated 19th April, 2011 lodged at the Kisii High Court, he prayed for the following main reliefs:-

> *" 1. THAT the Judgment entered herein on 24h April, 1997 and all other consequential and subsequent orders emanating therefrom be and is (sic) hereby set aside.*
>
> *2. THAT the Judgment entered herein on 24h April, 1997 and all other consequential and Subsequent orders be and is (sic) hereby varied and/or reviewed.*
>
> *3. THAT subsequently, the Nyamira District Land Surveyor's Report dated 5th February 1997 and filed in Court on 14th March 1997 be expunged from the court record and appropriate orders and/or directions be issued in respect of the rectified Survey Map herein.*
>
> *4. THAT in view of the circumstances of this case and in the alternative, appropriate, suitable and proper orders be issued in respect of the order dated 13th August, 1997 and the Land Surveyor's Report dated 51h February, 1997 and filed in Court on 14th March, 1997."*

The appellant invoked ***sections 1A, 1B*** and ***3A*** of the Civil Procedure Act, ***Order 45 rule 1*** and ***Order 51 rule 1*** of the Civil Procedure Rules as well as ***Article 159*** of the Constitution of Kenya. The appellant also invoked all other enabling provisions of the Law. The principal reason given by the appellant for seeking the above reliefs was that the previous orders were erroneously issued as they were based on an erroneous survey map. The appellant's reason for contending that the previous survey map relied upon for his eviction was incorrect was a subsequent survey map he claimed had been obtained from the ministry of Lands. In the appellant's view, the new survey map constituted new and important matter of evidence which was not within his knowledge and therefore could not be produced by him when the impugned judgment was passed.

It was that application which was heard by Makhandia J, and to which a preliminary objection was successfully taken, hence the appeal before us premised on nine grounds. The gist of those grounds is that the learned Judge of the High Court erred in declining jurisdiction when the new survey map showed that the impugned Act and ***Article 159 (2) (d)*** of the Constitution.

The appeal was canvassed before us by ***Mr. Nyachoti***, learned counsel for the appellant, and ***Mr. Nyariki***, learned counsel for the respondent

In his submissions, Mr. Nyachoti contended, in the main, that substantiative justice required that the impugned judgment be set aside or be reviewed and judgment be entered in accordance with the new survey map which would have been in favour of the appellant. Learned counsel was of the view that the overriding objective of the Civil Procedure Act as codified in ***section 1A and 1B*** thereof superceded the provisions of Order 45 of the Civil Procedure Rules and was entrenched in Article 159 (2) (d) of the Constitution.

To counter the foregoing, Mr. Nyariki submitted that the appellant's review application was properly struck out as the dispute had moved to the Court of Appeal and could not again be entertained by the High Court. In learned counsel's view, the source of the new survey map was suspect and the respondent's interest had not been taken into account in its preparation and subsequent production. It was learned counsel's further submission that the appellant was rewinding the clock on a closed matter.

We have considered the record, the grounds of appeal, the submissions of counsel and the law. What in

our view was before the learned Judge of the High Court and which gave rise to this appeal was an application for the review of the judgment entered in favour of the respondent on 24th April, 1997. Being an application for review, it substantially fell under ***Order XLIV rule 1 (1)*** (now order 45 rule (1) (1))of the Civil Procedure rules. The enabling provision of the law invoked by the appellant must have been ***section 80*** of the Civil Procedure Act which reads as follows:-

> ***"80. Any person who considers himself aggrieved-***
>
> a. ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
> b. ***by a decree or order from which no appeal is allowed by this Act,***
>
> ***may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit "***

And Order XLIV rule 1 (1) of the Civil Procedure Rules promulgated pursuant to section 80 of the Civil Procedure Act, provides:-

> ***"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 decree or made the order without unreasonable delay."***

It is to be observed that an application for review should be made ***"without unreasonable delay."*** In the present appeal we observe that the judgment of the High Court against which a review was sought was, as noted above, entered on 24th April, 1997. The appellant's second application for review which was struck out was dated 19th April, 2011, 14 years later. We think that the appellant did not act with speed in lodging his second application for review.

As both section 80 of the Civil Procedure Act and Order XLIV rule 1 (1) of the Civil Procedure Rules provide, for an application for review to succeed, the applicant must prove an error or mistake apparent on the face of the record, discovery of new and important matter or any sufficient reason - see **Shah -Vs - Dhavamchi [1981] KLR 561.** The applicant must also prove that he did not have, in his possession, the new and important matter or evidence at the time and it could not be obtained despite due diligence.

A plain reading of both section 80 of the Civil Procedure Act and Order XLIV rule (1) (1) of the Civil Procedure Rules also shows that a party aggrieved by a decree or order must make an election as to whether to appeal or seek a review. The two are mutually exclusive. One cannot pursue both.

Also significant are the prov1s10ns of Rule 6 of Order XLIV of the Civil

Procedure rules which provides:-

> **"6. No application to review an order made on an application for review of a decree or order passed or made on a review shall be entertained."**

We have considered what was placed before the learned Judge in support of the application for review in the light of the above provisions of the Law and the rules and having done so, we are satisfied that the

learned Judge cannot be faulted in striking out the appellant's application for review dated 19th April, 2011,

In our view, the learned Judge adopted the correct view of the matter when he stated as follows in his ruling:-

> ***"It is common ground that the applicant filed a suit against the respondent which suit was eventually determined in favour of the respondent when judgment was entered in terms of Nyamira District Land Surveyor's report . It is common ground that the applicant then sought review of the said judgment on account of apparent error on the face of the record as the report was not signed by the District Surveyor and that it was not final and conclusive. That application was dismissed by Mbaluto J on 13th August, 1997. The dismissal aforesaid elicited an appeal by the applicant which appeal was struck out. Undeterred the applicant filed an application for leave to file notice of appeal and memorandum of appeal out of time. That application was again struck out but the applicant was given a lifeline by the Court of Appeal to file a proper application which lifeline was not taken up by the applicant"***

All those findings of the learned Judge are not disputed and are on record. Given the findings , we cannot fault the learned Judge when he concluded, ***inter alia***, as follows:-

> ***"The applicant having knocked on the doors of the Court of Appeal and having been allowed in, he cannot again come back to this court and force open the doors of this court that had been permanently closed against him.....It is illustrative that the doors of the Court of Appeal are still wide open for the applicant to vindicate his rights..... By the act of the applicant moving to the Court of Appeal he knew that this court hall ceased to exercise jurisdiction over the suit and hence cannot come back again and reopen a matter that was subject of appeal."***

The learned Judge stated that the appellant **"knew"** that the High court had ceased to have jurisdiction, because of what the appellant's counsel had stated in his written submission in support of the review application. He had submitted, in part:-

> ***"29. We further submit my Lord, that the plaintiff having filed an application for review of the judgment entered on 24th April 1997 may not be allowed by the Rules of the Civil Procedure and particularly Order 45 of the Civil Procedure Rules, 2010."***

So, the appellant was alive to the fact that his application could not be allowed under Order 45 Rule (1) (1) of the Civil Procedure Rules. We add that even the parent **section 80** of the Civil Procedure Act expressly prohibits such an application.

On t e appellant's contention that notwithstanding the provisions of Order 45 Rule (1) (1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 (2) (d) of the Constitution conferred upon the High Court power to set aside and or review the judgment entered against the appellant on 24th April, 1997 the learned Judge stated:-

> ***"My simple answer to this submission is that sections 1A, 1B and Article 159 aforesaid on their own cannot find [found] an application or a suit .They only buttress an application or a suit. They embolden the court to administer justice without undue regard to procedural technicalities. It cannot be a procedural technicality where a provision of law provides that once you file an application for review and is denied, you cannot file a similar application later. That is the position which obtains here. "***

On the appellant's reliance upon section 3A of the Civil Procedure Act the learned Judge stated , in our view properly, that the section could only be invoked where the Civil Procedure Act and the rules made thereunder are silent as to how the court may be moved in any particular case. The application before the learned Judge was clearly governed by Order 45 of the Civil Procedure Rules thereby rendering

invoking of ***section 3A, otiose.***

The appellant's counsel made a similar plea before us arguing, passionately, that given the overriding objective as stipulated in sections 1 A and 1B of the Civil Procedure Act as read together with Article 159 (2) (d) of the Constitution, the provisions of Order 45 Rule (1) (1) of the Civil Procedure Rules were inapplicable. The appellant's contentions, in our view, misconceived. Section 1A provides:-

> ***" (1) The overriding objective of this Act and the rules made thereunder is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by this Act.***
>
> ***(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***
>
> ***(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to participate in the process of the Court and to comply with the directions and orders of the court."***

And section 1B reads:

> ***"1 B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-***
>
> ***(a) the just determination of the proceedings;***
>
> ***(b) the efficient disposal of the business of the court;***
>
> ***(c) the efficient use of the available judicial and administrative resources;***
>
> ***(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
>
> ***(e) the use of suitable technology."***

In our view, the overriding objective in reality is both a procedural and a substantive provision and the Court's role in exercising its discretion or power under the Act or the rules made thereunder must have the overriding objective in mind. Although the side note to section 1A ***"Objective of Act"*** suggests that the overriding objective should guide the interpretation of all provisions of the Act and the rules, the section did not invalidate other sections of the Act and the rules made thereunder. If any provision of the Act and the rules is to be inapplicable it must be repealed in the normal manner. In our view giving effect to the overriding objective is not the same thing as considering the other provisions of the Act and rules as inferior. In our view, it merely means that provisions of the Act and the rules aim at achieving the overriding objective. We must therefore reject the invitation of counsel for the appellant not to apply the provisions of the Civil Procedure Act and Order 45 Ru1e (1) (1) of the Civil Procedure Rules. It is indeed our view that the application for review which was made before the High Court and which was rejected by Makhandia, J went counter to the overriding objective. We say so, because the appellant being dissatisfied with the judgment entered on 24th April, 1997 sought a review of that judgment. He was perfectly entitled to take that option. When his 1st application for review was dismissed, he appealed against the order refusing review. He was again perfectly entitled to do so. His appeal was however, struck out as it was defective. The appellant restarted the appeal process and sought extension of time to lodge a fresh appeal. The application was struck out and the appellant was given liberty to lodge a fresh and proper application. The appellant, for unexplained reasons, gave up the appeal process and after a delay of about 14 years mounted the second review application. In our view, to allow the second review application would have been, not only contrary to the provisions of section 80 of the Civil Procedure Act and Order 45 Rules 1 and 6 of the Civil Procedure Rules, but would have also violated

section 1 A and 1 B of the Civil Procedure Act.

The appellant made heavy weather of the recommendation made by the original survey that:-

> ***"the case to be referred to arbitration before a final report is written. If it is found that the map is erroneous the same can be corrected by the land Registrar Nyamira District."***

This recommendation is not and could not blight the finding made by the same surveyor that the appellant was occupying a portion of the respondent's parcel of land. It will be recalled that the parties had agreed in their consent order recorded on 4th December,1996 ***that "Any party who is found to have encroached on another's land to vacate the same forthwith"*** hence the appellant's eviction from the respondent's parcel of land.

We also think to have allowed the appellant's 2nd review application, would have violated a principle of the overriding objective which demands the timely disposal of proceedings , and all other proceedings in the court at a cost affordable by the respective parties.

As stated in the case of ***Hunker Trading Company Limited -Vs- Elf Oil Kenya Limited [Nairobi Court of Appeal Civil Application No. 6 of 2010]***, in which an application for stay of executions was being considered, the overriding objective is to be applied on a case by case basis and in the exercise of the power under the overriding objective, the court must guard against any arbitrariness and uncertainties and ***"…must insist on full compliance with past rules and precedents which are "02" compliant so as to maintain consistency and certainty."*** The caveat stated in the case of ***Mradura Suresh Kantaria - Vs – Suresh Nanalal Kantaria [CA No. 277 of 2005](UR),*** must also be kept in mind. There, we said:-

> ***"The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially as ascertained."***

In the appeal before us, we are afraid the appellant did not bring himself on the right side of the overriding objective and could not therefore benefit from its exercise. The learned Judge of the High Court, in striking out the appellant's application for review of an order which was itself on an application for review, properly gave effect to the overriding objective. We have considered all the authorities cited to us by counsel, most of it involved applications under this Court's rules. We accept that the authorities correctly interpreted the overriding objective of the Civil Procedure Act. However, the circumstances which the Court considered in those cases are clearly different from the circumstances we are considering in this appeal which circumstances we have discussed herein above.

The appellant also invoked Article 159 (2) (d) of the Constitution which provides:-

> ***"In exercising judicial authority the Courts and tribunals shall be guided by the following principles..... .***
>
> ***(d) justice shall be administered without undue regard to technicalities ..... "***

As the Supreme Court stated in ***Raila Qdinga & 2 Others -Vs- Independent Electoral Commission and 3 Others [2013] eKLR ,?the essence of this provision is that a court of law should not allow the prescription of procedure and form to trump the primary object of dispensing justice to the parties."*** This principle, in the words of the Supreme Court, ***"is not cast in stone."*** In other words, the provision is not a panacea for all ills and in all situations. As we have endevoured to demonstrate above, denial of a second review application to a party who had previously sought a review of the same order and after it was denied unsuccessfully appealed against the order declining review, would not, in our view, be construed as undue adherence to procedural technicalities. With all due respect, we think the appellant is hanging on straws. Our conclusion is that the learned Judge of the High Court, given the circumstances he was considering, conscientiously determined the appellant's application for review and properly rejected it.

The upshot of our above consideration of this appeal is that the same has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT KISUMU This 21ST DAY OF MAY, 2015

D.K.MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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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