



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 16 OF 2007

BETWEEN

KITTS MBATI MUKONYOLE.....APPELLANT

AND

LEVI NDOMBI MUKONYOLE.....RESPONDENT

*(Appeal from the ruling and order of the High Court of Kenya at Kakamega Kariuki, GBM, J.)
dated 18th May 2006*

in

Kisumu H.C.C.A. NO. 31 of 1998)

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court of 18th May 2006 of Kariuki, GBM, J, in the matter where the learned judge declined to grant an order of review sought by the appellant.

The brief facts of the case are that the appellant filed a complaint in the *Malava Land Disputes Tribunal No. 95 of 97* seeking the eviction of the respondent who he contended had encroached on his land, that is Land Reference No. South/Kabras/Samitsi/99 comprising 6 acres (*the disputed property*).

Upon hearing the parties to the dispute the Land Tribunal found that the respondent was entitled to 1 acre of the disputed property, while the appellant was to retain 5 acres. The appellant filed an appeal to the Provincial Land Disputes Appeals Tribunal. On the date of the hearing the respondent did not attend, and as a result, the Appeals Tribunal heard the appeal exparte. In the end, the appeal was dismissed and the Land Tribunal, ordered the respondent to vacate the disputed property.

The respondent appealed to the High Court which found that the deliberations were improper, and quashed the decision of the Appeals Tribunal thereby reinstating the decision of the Land Tribunal. Being aggrieved by the decision, the appellant sought a review in the High Court.

On its part, the High Court dismissed the review application, for reasons that no material had been

brought to the attention of the court or was overlooked in error, which if considered, would have resulted in a different decision. It is that decision that has provoked this appeal.

In the memorandum of appeal the appellant's basic complaint was that the learned judge dismissed the application without giving reasons; that the requirements of **Order 45** of the retired **Civil Procedure Rules** had been met; and that the learned judge had upheld a judgment that had no basis in law, and offended the provisions of the Land Disputes Tribunal Act.

When the appeal came up before us, **Mr. O. Munyendo**, learned counsel for the appellant, submitted that the matter concerned the ownership of the disputed property. The appellant had inherited the disputed property from his father. He had obtained letters of administration in respect of his father's estate which had not been contested. Subsequent to this, the appellant transferred the disputed property to himself, and had then requested the respondent to move from the disputed property. The respondent had refused, and as a result the appellant had filed the proceedings in the Land Tribunal.

Counsel further submitted that in quashing the decision of the Appeals Tribunal, and reinstating the Land Tribunal's decision, the appellant lost the right to be heard on appeal. Counsel argued that the High Court had failed to appreciate that the Land Tribunal did not have jurisdiction to make an order of subdivision of the disputed property, which was the basis upon which the appellant sought a review.

On his part, **Mr. Osango**, learned counsel for the respondent, opposed the appeal, and submitted that the learned judge rightly declined to order a review as there was no error apparent on the face of the record, and no new material had been placed before the court for consideration; that what the appellant sought was for the appeal against the Land Tribunal to be referred back to the Appeals Tribunal for hearing. Counsel conceded that the Land Tribunal did not have jurisdiction to cancel the appellant's title, but that in respect of the review application, no new evidence had been presented to the court.

In his response, Mr. Munyendo argued that the issue for consideration was whether the High Court was right to order the reinstatement of the orders of the Land Tribunal.

We have considered the record of appeal, the submissions of counsel and the law and will begin by considering when a court may review a judgment or order.

Order 45 of the **Civil Procedure Rules** clearly sets out the basis upon which a court can review its orders. The conditions are: (a) there must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed, or the order was made; or (b) there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and (c) the application must have been made without delay.

The appellant's case is that there was an error of law apparent on the face of the record, in that the High Court should have taken into account that the Tribunal did not have jurisdiction to make an order of subdivision of the disputed property, but instead, when the appellant sought a review of the High Court's decision to reinstate the Land Tribunal's decision, the High Court had dismissed the application.

The question as we see it is whether in determining the review application, the court below rightly found that there was no error apparent on the face of the record, or that no new information had been placed before the court.

In the case of ***National Bank of Kenya Limited vs Ndungu Njau Civil Appeal No 211 of 1996*** this Court stated,

“A review may be granted whenever the court considers it necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor could it be a ground for review that the court proceeded on an incorrect

exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

In the review application, the appellant averred that he had not been granted an opportunity to be heard by the Appeals Tribunal since, the High Court had determined the dispute, instead of referring it back to the Appeals Tribunal. According to the appellant it was this failure to refer the appeal back to the Appeals Tribunal that amounted to the error apparent on the face of the record.

However, when the court below considered the application it found that since no new information had been placed before it for consideration, and it was not apparent from the material that there was no error apparent in respect of the court’s initial decision, it was not a matter that was deserving of an order of review.

The appellant’s main grievance in this appeal, is that the High Court reinstated the order of the Land Tribunal which in his view was illegal and contrary to the provisions of the Land Disputes Tribunal Act. But when we consider the averments in the review application, it is evident that this was not an issue that was placed before the court for consideration. In so saying, the question of an error apparent on the face of the record could not be said to arise.

Consequently, we agree that, the High Court rightly dismissed the review application as the criterion set out in **Order 45** of the **Civil Procedure Rules**, had not been met, and we find no reason to interfere with the ruling of the court below, the appeal is dismissed, with costs to the respondent.

Dated and delivered at Kisumu this 20th day of November, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR