IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 92 OF 2008

ANTHONY GACHARA AYUB ……. APPELLANT

AND

FRANCIS MAHINDA THINWA ……..... RESPONDENT

(Appeal against the Ruling of the High Court at Nyeri

(Makhandia, J.) dated 20th February, 2008

in

HCCC No. 104 of 1989)

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JUDGMENT OF THE COURT

1. By a plaint dated 30th May, 1989, Francis Mahinda Ayub Thinwa, *(respondent),* filed suit against the appellant his younger brother. The dispute between the parties relates to ***Land Parcel Magutu/Gatheru/17,*** which comprises 10.2 acres and which at all material times was registered in the name of William Githaiga Muthiru, *(the respondent's step-brother,* to hold the same in trust for the appellant and the respondent. The respondent claimed that the suit property was family land.

2. That in 1967, the said William Githaiga Muthiru transferred the suit property to the appellant who was to hold it in trust for the respondent in equal shares. The respondent's claim against the appellant as per the plaint is for a declaration that the appellant held the suit property in trust in equal share for the two parties hereto. The respondent also sought an order for sub-division of the suit property and transfer of half share free from any encumbrance.

3. The appellant in his defence denied existence of a trust in relation to the suit property and averred that he purchased the suit property from a one Gitau s/o Muthiru at a consideration of Ksh. 9,000/=. He also averred that the suit as filed was time barred by limitation. The appellant in his defence denied holding the suit property in trust and stated that the family land belonging both to himself and the respondent was consolidated and registered as ***Land Parcel No. Magutu/Gaikuyu/357***, comprising of 0.44 hectares and ***Magutu/Gaikuyu/367*** comprising 30.6 acres registered in the names of Wairimu w/o Thinwa and Githaiga s/o Thinwa respectively.

4. The suit between the parties was heard and judgment delivered by Hon. Justice J.V.J. Juma on 14th May, 2002. In his judgment, the learned Judge declared that the appellant held the suit property in trust for himself and the respondent and further ordered that the suit property be divided into two portions with the respondent getting 4 acres. That the said 4 acres was to be transferred to the respondent free from any encumbrance.

5. The appellant by way of Notice of Motion dated 9th September, 2005, moved the High Court seeking orders to review the judgment by Hon. Justice J.V.J. Juma dated 14th May, 2002, on the ground that there was an error apparent on the face of the record. During the hearing of the application, counsel for the appellant indicated that the error on the face of the record was that the learned Judge did not distinguish between William Githaiga and the late Githaiga s/o Muthiru. That the learned Judge erroneously held that ***Land Parcel Magutu/Gaikuyu/367***and ***Magutu/Gathehu/17,*** were both registered under the names of William Githaiga and the court made a mistake on the acreage of the parcels of land that belonged to the fathers of the parties herein. According to the appellant, the learned Judge (J.V.J. Juma) held that the land in issue belonged to and was registered in the names of William Githaiga who according to the Judge transferred the same to the appellant. It was submitted that that was not the correct position.

6. The application for review was heard by the Honourable Justice Makhandia *(as he then was)*. The learned Judge indeed found that the evidence on record was contrary to what the learned Judge (J.V.J. Juma) had held. He observed that the land belonged to Githaiga s/o Muthiru the paternal uncle to the parties who had passed on while William Githaiga was alive at the time of litigation but could not be called to give evidence as he was sick. He further observed that the trial Judge had treated the two persons as one and the same which was an error.

7. Despite the foregoing, the learned Judge ***(Makhandia J.)*** stated that the judgment and decree sought to be reviewed and set aside was delivered on 14th May, 2002. That the application for review was filed on 12th September, 2005, which was more than 3 years after delivery of the judgment. The learned Judge held that the delay was inordinate and had not been explained. It was held that the appellant was not entitled to review. On the issue of confusion between Githaiga s/o Muthiru and William Githaiga, the learned Judge held that misconstruing evidence cannot amount to a mistake or error apparent on the face of the record. That what the appellant was requesting the review court to do is to go into evidence, evaluate and or analyze the same and identify the error. The learned Judge held that this was not a function of a review court but an appellate court. For the forestated reasons, the application for review was dismissed and hence the present appeal.

8. In his memorandum of appeal, the appellant states that the honourable Judge erred in law in holding that there was inordinate delay which was not explained yet the record clearly indicated that the appellant had initiated an appeal to the Court of Appeal which had been struck out. That the Judge erred in law in holding that the failure to distinguish between the late Githaiga s/o Muthiru and William Githaiga was not an obvious error on the face of the record. That the Judge erred in failing to find that ***Land Parcel Magutu/Gaikuyu/367*** and ***Magutu/Gathehu/17,***were registered in the names of two different persons and not the same person as had been held by Hon. Justice J.V.J. Juma. That the Judge erred in failing to note that by dismissing the application for review, the appellant was denied redress in a court of law and thereby deprived 4 acres of land.

9. At the hearing of this appeal, the appellant was represented by learned counsel ***Mr. Kinyua Kiama***. Despite service of the hearing notice, the respondent who is on record in person did not attend.

10. Counsel for the appellant informed the Court that the decree arising from the judgment dated 14th May, 2002, had been executed and the suit property sold and transferred to a third party. It was submitted that the present appeal was against the ruling of the High Court declining to review the judgment dated 14th May, 2002. Counsel emphasized that the error apparent on the

face of the record was that the learned Judge failed to draw a distinction between William Githaiga and Githaiga s/o Muthiru; that the record shows that the two persons were different. It was submitted that the appellant never filed an appeal in this matter but instead opted for review because his application for extension of time to lodge an appeal was dismissed.

11. We have considered the grounds of appeal and taken into account submissions by counsel and we have analyzed the ruling by the learned Judge. The issue in this appeal can be stated as follows: did the learned Judge err in the exercise of his discretion in declining to review the judgment dated 14th May, 2002. We emphasize that what is before us is not an application to review the judgment dated 14th May, 2002. We further note that Counsel for the appellant has brought to the attention of this Court that the suit property has been sold and transferred to a third party who is not represented in these proceedings.

12. Under the provisions of ***Order 45*** of the ***Civil Procedure Act***, a party who chooses to proceed by way of review loses the right of appeal. In the instant case, the appellant choose the route of review of the judgment dated 14th May, 2002, and lost his right of appeal when review was declined. As regards the learned Judge's exercise of discretion in declining review, in ***Mbogo & Another- vs- Shah (1968) E.A. 93*** at page 95, ***Sir Charles Newbold P.*** held:

> ***"…a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."***

13. In is our considered view that the appellant's application for review before the learned Judge did not meet the principles or standards as required by **Order 45 rule 1 (1)** of the ***Civil Procedure Rules, 2010***. The grounds upon which an application for review ought to be based are clearly set out in **Order 45 Rule 1(1)**. Such application should not be the subject of an appeal and there was no new evidence or matter put before the Court that was not unreasonably in the knowledge of the Court at the time that the Orders were made. An application for review should also be promptly filed. It is our view that the three year delay in the instant case is inordinate. (See *M***ichael Mungai v Ford Kenya Elections & Nominations Board & Ors. (2006) eKLR, Nyamogo & Nyamogo Advocates v Kago (2001) 2 EA 173** as well as **Muyodi v Industrial & Commercial Development Corporation & Anor., (2006) 1 EA 243***.)*.

14. Counsel for the appellant submitted that the learned Judge erred in failing to find that there was an apparent error on the face of the record. In the case of ***Draft and Develop Engineers Limited – v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011***, the High Court correctly stated that:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. 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 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 a review although it may be for an appeal"***.

14. This Court in **Muyodi v Industrial & Commercial Development Corporation & Anor.,**

(2006) 1 EA 243*)* held that:

> ***"For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay".***

15. In the instant case, we are of the considered view that the appellant has not been able to demonstrate to us that the Judge erred in the exercise of his discretion in declining to grant the order for review. The Judge considered the three (3) year period of delay as inordinate and no sufficient explanation for the delay was given. The appellant submitted that the delay was occasioned by failure to obtain leave to extend time to lodge an appeal. We are of the view that when a party takes a wrong legal step in prosecution of its case, time continues to run and such a wrong step is not *prima facie* an excuse for inordinate delay. We note that the suit property has been sold and transferred to a third party and this Court cannot make orders in vain or against a party who is not represented in the proceedings. We further note that the appellant did not establish the grounds for review as required under ***Order 45 (1)*** of the ***Civil Procedure Rules***. It is our view that there was no apparent error on the face of record as per the dictum in **Muyodi v Industrial & Commercial Development Corporation & Anor., (2006) 1 EA 243***)*. The upshot of the foregoing is that we find that the learned Judge did not err in declining to make an order for review. This appeal has no merit and is hereby dismissed with no order as to costs.

Dated and delivered at Nyeri this 13th day of May, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR