



**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, J.J.A)
CIVIL APPEAL NO. 350 OF 2005

BETWEEN

**STEPHEN MUTHEE (as legal representative of the Estate of
EVELYN KARAMBU (deceased)APPELLANT**

AND

SAMSON NDERITU MURITHIRESPONDENT

***(An appeal from the judgment and orders of the High Court of Kenya at Meru (Kasanga Mulwa, J.)
dated 17th day of July, 2003***

in

H.C.C.A. NO. 84 OF 1994)

JUDGMENT OF THE COURT

This is an appeal from the judgment of Kasanga Mulwa J. delivered at Meru on 17th July, 2003 in which the learned Judge dismissed the appellant's appeal to that court.

The brief background to this appeal is that by an application dated 30th October, 1993 the respondent applied for the appellant's suit to be dismissed for want of prosecution. The respondent's main complaint in that application was that the last time the case was in court was on 21st July, 1993 and that more than three months had elapsed and yet the appellant (as the plaintiff) had taken no action to have the case set down for hearing. That application was resisted by the appellant stating that there was a problem in fixing the case for hearing in court No. 2 as a result of the death of the Resident Magistrate Mr. Ashioya.

Having heard the submissions by counsel appearing for the parties the learned Senior Resident Magistrate allowed the application by dismissing the appellant's suit under **Order XVI Rule 5(d)** of the Civil Procedure Rules. Although it is not clear, it would appear that the ruling dismissing the appellant's suit was delivered on 31st January, 1994.

Being aggrieved by the foregoing the appellant through his advocates filed an application dated 22nd April, 1994 seeking a review of the ruling that dismissed his suit for want of prosecution. In that application for review the appellant was represented by an advocate (Inoti) who relied on the affidavit in support of the application. It was explained that the suit had been originally filed in the High Court in Nairobi but then transferred to the Chief Magistrate's Court at Meru. The suit was listed several times for hearing and at one time a settlement of the suit out of court was contemplated. It was after the death of the

magistrate (Mr. Ashioya) that the suit was delayed. Learned Senior Resident Magistrate (M.N. Gicheru) was told that the appellant having obtained consent of the Land Control Board moved on the land which he developed and hence he had nowhere to go. The court was urged to allow the appellant to be heard rather than being condemned unheard.

The application was opposed by the respondent's advocate who submitted that the application for review had not satisfied the requirements of **Order XLIV rule 1** of the Civil Procedure Rules.

The learned Senior Resident Magistrate considered the foregoing rival submissions and in a short ruling delivered on 1st August, 1994 dismissed the appellant's application with costs. Indeed the entire ruling was as follows: -

“The application by the plaintiff is dismissed with costs for I am not satisfied after considering the application and affidavits that any ground warranting a review has been proced (sic). The plaintiff is not saying that there is discovery of a new and important matter or evidence. There is nothing to show that there is an error or a mistake on the gave (sic) of the record. There is no new matter which the court did not consider in its earlier decision dismissing the suit for want of prosecution. For this reason the application for review is dismissed with costs.”

The appellant was naturally aggrieved by the foregoing and hence filed an appeal in the High Court challenging the ruling of the learned Senior Resident Magistrate. That appeal was placed before Kasanga Mulwa J. for hearing on 8th April, 2003 when Mr. Kioga appeared for the appellant while the respondent was represented by Mr. Arithi. After submissions by counsel the learned Judge reserved his judgment which he eventually delivered on 17th July, 2003 as already stated at the commencement of this judgment. The learned Judge dismissed the appellant's appeal by stating *inter alia*: -

“The grounds upon which a court can be asked to review its ruling are specifically provided under Order 44 Rule 1. These grounds are the discovery of a new and important matter or evidence, which was not within the knowledge of the applicant or could not be produced by him at the time when the ruling was made or where there is an error apparent join (sic) the face of the record. The court is also given an umbrella discretion to entertain any other sufficient reason. None of these grounds were pleaded by the appellant in his motion. Neither was a mention given to them in the annexed affidavit in support of the application.

In the circumstances and basing on what is on the records before me, the learned magistrate was not given any or any sufficient ground to warrant his exercise of his discretion to review his earlier ruling. In any case a review may only be granted where the court considers it necessary to correct an error of omission apparent on its record that is self evident and does not require an elaborate argument to establish.

Having considered all the factors of this appeal and the arguments put forward by both counsels for the appellant and counsel for the respondents, I find this appeal unmeritorious and the same is hereby dismissed with costs. Orders accordingly.”

It is the forgoing that provoked this appeal in which the appellant, through his advocates, filed a Memorandum of Appeal containing the following six grounds:-

(i) The learned Judge made poor record of the counsel's submissions and took too long to write a judgment whereby the judge totally failed to appreciate the gist of the appellant's Counsel's submission and thereby arrived at wrong and erroneous conclusion.

(ii) The learned Judge failed to consider the law and authorities submitted to him by the counsel for the appellant and for that reason, he erroneously exercised his discretion wrongly and contrary to the principals (sic) of law – thus confirming a finding or a position of the lower court which was unjust and tainted with impropriety.

(iii) The learned Judge failed to consider the fundamentals entailed in exercise of judicial

discretion and further failed to reconcile provisions of S.80 of Civil Procedure Act and Order XLIV of Civil Procedure Rules.

(iv) The learned Judge failed to appreciate the appellant counsel's submission of the possibility of the Senior Resident Magistrate in the lower court, having been influenced by improper or extraneous considerations when he imposed his own knowledge of the facts not brought before him in pleading or in evidence and relied on those facts as justification to refuse to review his own orders.

(v) The learned Judge failed to properly discharge his paramount and fundamental role as arbiter of justice and fairness without sticking too rigidly on unfair and unjust technical rules of procedure.

(vi) The learned Judge further seemed to misunderstand his roll as an adjudicator on questions of law and procedure as expounded under paragraph 2 & 3 of P.2 and paragraphs 1 & 2 of page 3 of his judgment."

That is the appeal that came up for hearing before us on 2nd November, 2011, when Mr. M.M. Kioga continued to appear for the appellant while Mr. Mwirigi Kaburu appeared for the respondent.

In his submissions Mr. Kioga complained that the recording of proceedings in the High Court was poorly done so that it was not easy to appreciate what the learned Judge had recorded. Mr. Kioga took issue with the fact that the learned Judge took well over three months to deliver his judgment as the appeal before the learned Judge was heard on 8th April, 2003 and judgment was delivered on 17th July, 2003.

The second ground of appeal related to the fact that the authorities cited by Mr. Kioga were not reflected in the judgment of the learned Judge.

The third ground was on the alleged failure of the learned Judge to consider the fundamental principles guiding a judge in the exercise of judicial discretion. Mr. Kioga went on to argue that the learned Judge failed to reconcile the provisions of **section 80** of the Civil Procedure Act and **Order XLIV** of the Civil Procedure Rules. Mr. Kioga referred to the affidavit of Mr. Mbaabu at page 43 of the record of appeal which, in his view, set out the circumstances prevailing at Meru Law Courts following the death of the magistrate (Mr. Ashioya).

The fourth ground was on the complaint that after the death of Mr. Ashioya there was no replacement until after three months.

The fifth and sixth grounds related to the issue of technicalities. Mr. Kioga submitted that justice had to be administered without undue regard to technicalities. He referred to **Article 159** of the Constitution and overriding objectives of litigation.

To buttress his submissions Mr. Kioga referred us to various authorities including one from the High Court of Uganda.

In response to the foregoing Mr. Kaburu submitted that there was nothing wrong with the way the learned Judge recorded proceedings and that it was possible to follow the record and hence that ground had no merit.

On the second ground Mr. Kaburu submitted that what was before the learned Judge was the appeal and hence he had to deal with the grounds set out. On the issue of authorities cited during the hearing of the appeal Mr. Kaburu submitted that it was not necessary for the learned Judge to include these authorities in his judgment.

On the third ground of appeal Mr. Kaburu pointed out that as the application was brought under **Order XLIV** of the Civil Procedure Rules the learned Judge cannot be faulted for not considering **section 80** of

the Civil Procedure Act.

On the remaining grounds Mr. Kaburu submitted that a look at the judgment of the learned Judge shows that all that was placed before the Judge was considered as the principles set out under **Order XLIV** were considered.

Finally, Mr. Kaburu was of the view that the applicant was late in making an application under **Order XLIV** as the application was made after a delay of three months.

To buttress his submission, Mr. Kaburu referred us to two authorities.

The foregoing was what was placed before us for determination.

As we have indicated elsewhere in this judgment the dispute herein can be traced back to 1980 when it is alleged that the appellant and respondent entered into a sale agreement in respect of land title **No. KIRUA/NAARI/1016**. That is what appears in the original plaint filed in the High Court of Kenya at Nairobi in **Civil Case No. 1898 of 1981**, in which the appellant here was the plaintiff and the respondent was the defendant. The respondent through his advocates filed a defence and a counter-claim. Clearly there has been protracted litigation in which the parties have been in courts of law for the last thirty years.

The appellant's tribulations started when his suit was dismissed for want of prosecution. He challenged that order of dismissal when he filed an application for review. We have carefully considered the submissions of Mr. Kioga and of Mr. Kaburu and we think that the matter should be traced from the ruling of the learned Senior Resident Magistrate delivered on 1st August, 1994, in which the learned Senior Resident Magistrate dismissed the appellant's application for review. We have reproduced the entire ruling which was then challenged by the appellant in the High Court. The old **Order XLIV Rule 1** of the Civil Procedure Rules provided: -

“(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.”

The rule talks of discovery of new and important matter or evidence, mistake or error apparent on the face of the record or for any other sufficient reason. The issue that was to be considered is whether there was sufficient reason to warrant a review of the order of dismissal of the suit for want of prosecutions. As we have endeavoured to show the dispute arose way back in 1980 and the subject matter was land which, as we know, can be very sensitive to the parties involved. It has been pointed out that the Resident Magistrate Mr. Ashioya died and that this suit had been under him before he died. After the death of the magistrate it would appear that it took sometime before a replacement was made. This led to not only delay but confusion to some extent.

We think that if the learned Senior Resident Magistrate and the learned Judge had considered the history of the dispute and the facts relating to the death of the magistrate in whose court the suit had been assigned, those appeals would have constituted “*sufficient reason*” envisaged by the then **Order XLIV** of the Civil Procedure Rules. It is our view that both the learned Senior Resident Magistrate and the learned Judge took a very restrictive interpretation of **Order XLIV**. But as it has been stated many times the rules of procedure are handmaidens of justice which are intended to facilitate the administration of justice to all parties before the court. In the present appeal the appellant had complained that he was condemned

unheard. It is cardinal principle of equity that nobody should be condemned unheard. We have set out the circumstances under which the appellant's suit was dismissed and the efforts made to rescue the suit. The efforts failed and hence this is why the appellant is before this Court.

The issue now is whether the learned Judge was right in dismissing the appellant's appeal. We have set out, in brief, the rival submissions by both Mr. Kioga and Mr. Kaburu. With due respect to the two courts below, we think that this was a proper case for review so that the parties could be allowed to ventilate their respective cases.

Sections 3A and 3B of the Appellate Jurisdiction Act provide: -

“3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the At.

(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) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

3B. (1) For the purpose of furthering the overriding objective specified in section 3A, 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 use of the available judicial and administrative resources;**
- (c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- (d) the use of suitable technology.”**

Although this enactment was not in existence then, nonetheless, we feel the principle envisaged by it should apply in this case as the circumstances warranted that approach.

In view of the foregoing we are satisfied that in the circumstances of this dispute the appeal before us is meritorious. We therefore allow it and set aside the judgment of the High Court and the Ruling of the Senior Resident Magistrate. The appellant is hereby allowed to prosecute his case before a subordinate court of competent jurisdiction. The appellant is awarded the costs of this appeal and of the two courts below.

Dated and delivered at Nyeri this 2nd day of December, 2011.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR