



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**Civil Appeal 227 of 2004**

ANERIKO M. SIMIYU ..... APPELLANT  
AND  
REDEMPTA SIMATI ..... RESPONDENT

*(Appeal from the ruling of the High Court of Kenya at Bungoma (Sergon, J.)  
dated 23<sup>rd</sup> July, 2004  
in*

*H.C.C.C. NO. 94 OF 1999)*

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the superior court, **Sergon, J.** delivered on 23<sup>rd</sup> July, 2004.

The subject matter of the learned Judge's ruling was an application for review under **Order XLIV** of the *Civil Procedure Rules*. In the application, the respondent/applicant had sought, *inter alia*, an order for temporary injunction to restrain the appellant/respondent from alienating or disposing of East Bukusu/South Kanduyi/8051; an order of review to set aside the superior court's order of 13<sup>th</sup> December, 2001; an order restoring 0.97 Hectares to East Bukusu/South Kanduyi/15 to be excised from East Bukusu/South Kanduyi/8051 and an order of rectification of the register to reflect the changes.

The genesis of the appeal is that in the *Bungoma Senior Resident Magistrate's court Civil Case No. 469 of 1995* the respondent the late Liberio Masinde Simati, but represented by his widow Redempta Simati as his legal representative sought an eviction order against the appellant herein from East Bukusu/South Kanduyi/7029. However, on 20<sup>th</sup> July, 1995 the presiding magistrate referred the dispute to the Land Disputes Tribunal, Kanduyi. The tribunal made an award in favour of the deceased's legal representative. The appellant then appealed to the Provincial Land Disputes Appeals Committee sitting at Kakamega but the Committee affirmed the decision or award of the Land Disputes Tribunal, Kanduyi. Aggrieved, the appellant filed an appeal in the superior court and by a judgment delivered on 8<sup>th</sup> August, 2000, Mbiti, J. quashed the award. Following the quashing of the award, the appellant caused parcel East Bukusu/South Kanduyi/7029 which measured 0.44 hacteres subdivided into three portions, namely, East Bukusu/South Kanduyi/8050, East Bukusu/South Kanduyi/8051 and East Bukusu/South Kanduyi/8057. The unsubdivided parcel, namely East Bukusu/South Kanduyi/7029 boarded parcel No. East Bukusu/South Kanduyi/15 which was registered in the name of the deceased and as is apparent from the above analysis this parcel was not the subject matter of the case in the magistrate's court or the two land tribunals described above. However, through what appears to have been proceedings conducted exparte, a vesting order in favour of the appellant was made in respect of East Bukusu/South Kanduyi/15 but the vesting order was subsequently raised or lifted on 24<sup>th</sup> November, 2000 when the respondent moved to court. It is not clear what could possibly explain the involvement of the Deputy Registrar of the superior court in signing the vesting order and the Executive Officer of the superior court in signing mutation forms excising from East Bukusu/South Kanduyi/15 parcel of land measuring 0.97 hectares and adding to

East Bukusu/South Kanduyi/7029 thereby increasing its acreage to 1.41 hectares.

The application for review resulted in the superior court setting aside the court order dated 13<sup>th</sup> December, 2000 and an order that the 0.97 hectares of land excised from parcel East Bukusu/South Kanduyi/15 and added to land parcel East Bukusu/South Kanduyi/7029 but comprising in land parcel East Bukusu/South Kanduyi/8051 (following the subdivision by the appellant) be restored to parcel East Bukusu/South Kanduyi/15 and an order that the relevant land register be rectified to reflect the change.

Aggrieved by the said order, the appellant has come to this Court citing the following grounds of appeal:

- “1. **The learned trial Judge erred in law when he reversed orders made by his brother Judge on the 13<sup>th</sup> December, 2000 and those of 21<sup>st</sup> February, 2001.**
2. **The learned trial judge erred in law when he ordered subdivision of E/Bukusu/ S/Kanduyi/7029 and transfer of 0.97 hectors from the same land summarily by way of affidavits without evidence from parties as the same never resulted from orders of 13<sup>th</sup> December 2000.**
3. **The learned trial judge erred in law when he entertained extraneous evidence in an appeal that was concluded over four years ago.**
4. **The learned trial Judge erred in law when he overlooked evidence relating to creation of parcels of land that were involved in the trial.**
5. **The entire ruling and proceedings were made when the court was functus officio”.**

In the appeal, the appellant was represented by Mr. Sichangi, advocate while the respondent was represented by Mr. Kibera, advocate.

The principal submissions of the appellant are that the learned Judge, erred in hearing a second application for review contrary to the provisions of **Order 44** of the *Civil Procedure Rules* and that the effect of the second review amounted in *Sergon, J.* sitting on appeal of a judge of cognate jurisdiction. The appellant further submitted that the delay in bringing the application for review was inordinate and for this reason the court should not have allowed it.

It was urged for the respondent that the application dated 27<sup>th</sup> November, 2000 and which had resulted in the *exparte* order being made was not served on the respondent but all the same the court proceeded to issue the orders on 13<sup>th</sup> December, 2000. The respondent's counsel further contended that it is the unserved application which introduced into the dispute parcel East Bukusu/South Kanduyi/8051 although it was not part of the tribunals proceedings and therefore this was also a reviewable error which was apparent on the face of the record.

From the factual background which has been distilled from the pleadings it is clear to us that after the vesting order in favour of the appellant in respect of East Bukusu/South Kanduyi/15 the vesting order although quite rightly lifted afterwards by the court had resulted in subdivision of East Bukusu/South Kanduyi 8057 excising therefrom a portion measuring 1.41 hectare making it part of East Bukuru/South Kanduyi/7029 measuring 0.41 hectares and 0.97 hectares of the deceased parcel of land South Bukusu/Kanduyi/15 and the Land Registrar had caused title deed for East Buhusu/South Kanduyi/8057 measuring 1.41 hectares to be issued consisting of the combination of the two parcels East Bukusu/Kanduyi/7029 measuring 0.44 hectares and the portion excised from the respondents parcel East Bukusu/Kanduyi/15 measuring 0.97 hectares. What emerges from the combination of the two parcels above is that there is an error on the face of the record in that the ruling which purported to bring the proceedings of parcel East Bukusu/Kanduyi/15 into the proceedings of the tribunal and in the magistrate's court had errors apparent on the face of the record.

We are of the view that these two errors entitled the court to exercise its powers of review under **Order 44** of the *Civil Procedure Rules* and in our view the learned Judge cannot in the circumstances be said to have sat on appeal in respect of the ruling of *Mbito, J.*, a judge of cognate jurisdiction.

On the contrary, we are of the view that the superior court, *Sergon, J.* handled the situation admirably in terms of putting to an end what appears to have been a suspicious mutation and subdivision which unfortunately involved some court officials when it was clear that

such transactions are ordinarily handled by the Lands office and the survey office. Consequently, we are of the view that the review was within the ambit of the review jurisdiction as captured by this Court in the case of **National Bank of Kenya vs. Ndungu Njai** – *Civil Appeal No. 211 of 1996* (unreported).

The challenge that the learned Judge could only have acted on the basis of oral evidence instead of relying on affidavit evidence has no basis in law. Review applications are invariably dealt with by the courts on the basis of affidavit evidence. In this regard, it is incorrect to state that the court relied on extraneous evidence whereas it is clear from the record that, the court in reviewing its past decisions relied solely on the record. Again, it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes apparent on the face of the record because the ultimate result would be injustice.

Accordingly, the appeal is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of September, 2010.**

**R. S. C. OMOLO**  
.....  
**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**  
.....  
**JUDGE OF APPEAL**

**J. G. NYAMU**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**