



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 257 OF 2002

NDUNGU NJAUAPPELLANT

AND

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

(An appeal from the Ruling of the High Court of Kenya (P. J. Ransley,

Commissioner of Assize) dated 31st January, 2002

in

H.C.C.C. No. 1399 of 1995

JUDGMENT OF THE COURT

This appeal is against the ruling of the Commissioner of Assize (P. J. Ransley) delivered on 31st January, 2002 in Nairobi High Court ***Civil Case No. 1399 of 1995.***

The suit, the subject of the ruling related to overdraft facilities granted to the appellant by the respondent in 1991, for which he charged his parcel of land *Githunguri/Githunguri/1073*, but which the respondent felt were not satisfactorily serviced and gave notice to realize the security in February 1994.

On 5th May 1995 the applicant filed the suit at the High Court to pray for:

- (a) A permanent injunction restraining the defendant from alienating, selling, transferring, advertising for sale or otherwise dealing or interfering with L.R. Githunguri/Githunguri/1073.***
- (b) A declaration that the plaintiff is not under any obligation to pay the sum allegedly paid to Kangethe & Company advocates by the defendant).***
- (c) An order compelling the defendant to release the plaintiff's title L.R. Githunguri/Githunguri/1073 and to discharge its charge.***
- (d) Any further or other relief this honourable court may deem fit.***
- (e) Costs of the suit.***

The judgment in respect of the suit was delivered by the Commissioner of Assize on 27th day of September 2001 dismissing the plaintiff's claim and awarding the defendant Kshs.331442/= with costs and interest at courts rate. It is against this judgment of which the appellant applied for review on 23rd November 2001 and which was dismissed on 31st January 2002 as aforesaid, hence this present appeal before us.

In a memorandum of appeal filed against this ruling dated 27th March and filed in court on 27th March 2002 and lodged in the Court Registry on 2nd October 2002, the appellant set out six grounds of appeal, namely:-

- “1. That the learned Commissioner of Assize erred in law and fact in failing to set aside his judgment and to order hearing of the suit de novo in the light of all the circumstances of the case;**
- 2. That the learned Commissioner of Assize erred in law in proceeding and deciding on the counter claim when the same was filed irregularly prior to the issuance of summons to enter appearance and when the same was not replied to.**
- 3. That the learned Commissioner of Assize erred in law and in fact in failing to find that the suit proceeded prematurely before him in that the pretrial orders of Justice Githinji and the Court of Appeal had not been complied with and the defendants were in contempt of court.**
- 4. That the learned Commissioner of Assize erred in law and in fact in allowing the defendant to be heard whereas he was in contempt of court and proceeding to reward the contemnors by dismissing the plaintiff's suit with costs as well as the application to set aside the judgment.**
- 5. That the learned Commissioner of Assize (sic) ruling was against the weight of evidence adduced and biased.**
- 6. That the Commissioner of Assize erred in law in failing to review and/or set aside the judgment on the counterclaim whilst at the same time allowing the defendants to exercise their statutory power of sale thereby subjecting the plaintiff to double jeopardy.”**

When counsel for the appellant (Mr. Gichuki King'ara) appeared before us on 15th May, 2008 he did not submit on the grounds one by one but argued on what he considered to be an apparent error or mistake on the face of the record which he said the Commissioner of Assize did not exercise his discretion properly to deal with.

According to him the apparent error on the face of the record was the way the Commissioner of Assize proceeded with the matter notwithstanding the order which had been made by Githinji J. (as he then was) and that this was a sufficient reason to warrant the Commissioner to review or set aside his order of 27th September 2002.

The application the appellant made before the Commissioner of Assize the ruling of which is the subject of this appeal was by notice of motion under **Order XLIV Rules 1, 2 and 3** of the Civil Procedure Rules and all enabling provisions of the law. We believe the enabling provisions of the law referred to must include **section 80** of the Civil Procedure Act which provides as follows:

“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.”

Order XLIV (1) of the Civil Procedure Rules, on the other hand, gives specific grounds upon which review applications can be made. These are:-

- (a) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed,*
- (b) Where there is a mistake or error apparent on the face of the record and*
- (c) For any other sufficient reason*

When the appellant made the application for review before Milimani Commercial Court he listed the grounds in support thereof as follows:

- (a) That this suit proceeded unprocedurally prior to the relevant pretrial procedures being put into place.*
- (b) That whereas the defendant’s defence and counterclaim was considered, this honourable court has never issued summons to enter an appearance or a dispensation thereof.*
- (c) That the plaintiff’s previous counsel proceed with this case prior to the defendant’s compliance with Justice Githinji’s orders of 3rd July 1995 thereby materially compromising and jeopardizing the plaintiff’s case.*
- (d) That the defendants deliberate failure to issue a bill of costs to the plaintiff as ordered amounted to contempt of court and they were not entitled to a hearing.*
- (e) That the dispute herein arose out of the defendant’s action of charging the plaintiff’s Kshs.266,000/= to recover the amount of Kshs.109,000/=. The plaintiff contested the charges and Justice Githinji ordered the defendant to issue them with Bills to enable an application for taxation to be made.*
- (f) That the plaintiff’s previous advocate failed to file a defence to counterclaim and judgment has now been entered in this court for the sums claimed in the counterclaim.*

The supporting affidavit to the application was in similar terms as the grounds on the face thereof though in greater details; more emphasis being placed on the respondent’s contempt for Justice Githinji’s order to draw up the bill on advocates costs for taxation.

Neither in that application, its grounds or supporting affidavit nor in this appeal before us was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof – see **Kimita v. Wakibiru [1985] KLR 317** at page 321.

Nor was there any submission before this court about any mistake or error apparent on the face of the record to warrant an order of review which was sought before the learned Commissioner of Assize.

As was put by this Court in **Civil Appl. No. 211 of 1996** arising from an application in the case subject to this appeal:-

“the error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established.”

There was no reference to such mistake or error before the trial Commissioner of Assize or to this Court. The grounds of appeal before us do not point to any such omission or error.

Instead counsel for the appellant sought to persuade us that the Commissioner of Assize did not consider that the respondent's failure to honour Justice Githinji's order to draw up a bill of costs for taxation amounted to contempt of court and hence constituted sufficient ground to warrant the grant for an order for review by the said Commissioner of Assize.

In *Kimita v. Wakibiru* – *ibid*, *Nyarangi J.A.* (as he then was) said:

“The words “for any other sufficient reason” have therefore been construed ejusdem generis with the grounds of discovery to which I have referred. ... In other words that the words “for any other sufficient reason” in Order XLIV rule 1 are hence confined to a reason which would be a kin to those specified immediately previously in the order:

... I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words “for any other sufficient reason need not be analogous with the other grounds specified in the order: See Sadan Mohamed v. Chasan Singh (1959) E.A. 793.

But in spite of this finding we are far from being convinced that because the respondents did not obey the order of Mr. Justice Githinji to draw up a bill for taxation that amounted to contempt of court hence sufficient reason to warrant the Commissioner of Assize to make an order of review sought. We say so with realization that counsel is aware there are specific provisions and/or procedures to follow in the event one commits contempt of court on how to handle the issue of taxation of bills of costs.

Justice Githinji's ruling on the issue of the advocates costs had this to say:

“It appears to me that the plaintiff has a genuine complaint regarding the sum of Kshs.266,000/= paid to the bank's lawyers and which have been debited to the loan account. Plaintiff's complaint is not really about the amount due. Plaintiff is saying that if it were not for the unconscionable and unjustified legal fees there would be no amount due to the bank for which the bank is entitled to sell the land. The plaintiff is raising the issue of legality of the legal fees paid to Messrs. Kengethe & Company. It would be inequitable to sell the plaintiff's land before the issue of the legal fees is sorted out. To end this dispute it is only just that M/s Kangethe & Company Advocates should deliver up their bill of costs to enable the plaintiff to file the appropriate application and in the meantime grant an injunction limited to a reasonable period.”

The judge put the limited period at three (3) months and part of his orders was the one which required M/s Kangethe & Company Advocates to deliver up their bills of costs in respect of payments made to them by the defendant to the plaintiff's counsel; within thirty (30) days.

Being one of the orders that the judge made and as the appellant's counsel says it was not obeyed, was there no action he would have taken to prompt the other party take action except to wait to take it up in an application for review? Certainly looking at **Order XLIV Rule 1** of the Civil Procedure Rules this is not a ground for an application for review.

But the Commissioner of Assize did not lose sight of this in his ruling of 31st January, 2002. He said:

“This is a matter I dealt with in the judgement when I found that this plaintiff himself had said the charges of the advocate were properly debited. The orders of Justice Githinji were made in an interlocutory application and cannot fetter the court hearing the whole case from making such findings as it thinks just. If the plaintiff is dissatisfied, his proper remedy is to appeal.”

He even commented about the complaint over lack of summons to enter appearance on the counterclaim, unprocedural nature of the suit before him or failure by the previous counsel to file a defence to the counterclaim.

Much as we sympathise with the appellant but we are of the firm view that these were and are not

grounds upon which an order for review could have been granted.

In writing his ruling on the matter subject to this appeal, the learned Commissioner of Assize was exercising his unfettered discretion.

In the case of *Njagi Kanyunguti alias Karingi Kanyinjuti & 4 Others v. David Njeru Karingi – Civil Appeal No. 181 of 1998* Judges of Appeal quoted with approval what Sir Clement De Lestang V. P. said in *Shah v. Mbogo [1968] E.A. 93* on the issue of the exercise of discretion thus:

“I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration any matter which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In our view the learned Commissioner of Assize exercised his discretion properly in this matter and with respect to counsel, the points raised to seek an order of review before the Commissioner would have properly been raised as grounds of appeal in the superior court.

We find no merit in this appeal which we dismiss with costs to the respondent.

Dated and delivered at Nairobi this 13th day of June 2008

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR