REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

Civil Appeal 316 of 2002

MWIHOKO HOUSING CO. LTD……..……..APPELLANT

AND

EQUITY BUILDING SOCIETY……..……RESPONDENT

(*Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Githinji, J) dated 20th May, 2002*

in

H.C.C.C. NO. 5992 OF 1992)

****

JUDGMENT OF THE COURT

MWIHOKO HOUSING CO. LTD, the appellant, prefers this appeal against the order of the superior court *(Githinji, J as he then was)* dated 20th May, 2002 dismissing with costs its application dated 7th June, 2001 seeking review of the decree made on 29th September, 1999 in High Court Civil Case No. 5992 of 1992.

After a protracted trial which started in 1992 and was constantly punctuated with endless interlocutory applications, the following orders were made by the learned Judge in his judgment, the subject matter of the review application:-

"*1. That an order be and is hereby issued permanently restraining the defendant and/or its agents or servants from entering into and/or trespassing the plaintiff (sic) land parcel known as L.R. NO. 10902/9 or taking possession of or building on the said portion or in any way from interfering with the plaintiff's quiet enjoyment of the said land parcel number L.R. No. 10902/9 Ruiru, and that the permanent injunction shall not apply to the 18 or so persons who have erected permanent building in L.R. NO. 10902/9.*

2. That the District Officer, Ruiru, do ascertain the number of persons who have erected permanent building in L.R. No. 10902/9 after which Equity do sell the plots to the owners of respective buildings at a price to be agreed by Equity and owners of the building and in case of disagreement the District Officer to determine through arbitration the fair market price but such price not to exceed the price at which Equity will offer the rest of the plots to the members of public.

3. That the District Officer in charge of Ruiru do supervise the sale to the owners of permanent buildings.

4. That the claim for general damages be and is hereby reserved.

5. That there be liberty to parties to apply in respect of any dispute arising from orders No. 2 and 3 above.

6. That the costs of this suit be paid to Equity to be certified by the taxing officer of this Court.

7. That both the counterclaim and HCCC NO. 468/92 be and are hereby dismissed with costs."

The appellant was aggrieved by the said orders and timeously lodged a notice of appeal, but, it appears that a record of appeal was not lodged within the prescribed time and an application to seek extension failed and so was a subsequent reference.

However, about two years later on 7th June, 2001, the applicant opted to invoke the review jurisdiction of the court under the provisions of Section 80 of the Civil Procedure Act and Order XLIV Rules 1,2 and 3 of the Civil Procedure Rules seeking an order that the orders by *Githinji J* (as he then was) be reviewed. The application was made on two grounds, as follows. Firstly, that there was a discovery of new and important matters or evidence which have come to light after the decision was made. These were said to be:-

(a) the ruling dated 24th February, 1993 in HCCC No. 5972 OF 1992 which the appellant averred was relevant in the matter but was missing from the court file and the same was missing at the time of the writing of the judgment delivered in court on 29th September, 1999;

(b) that in the ruling dated 24th February, 1993 the court had established that there was an Agreement of Sale between the administrators of the estate and the appellant;

and

(c) that in that ruling the court found that *Mary Wamuhu Muigai* who sold the suit land to the respondent was aware of the dispute and the existing suits.

Secondly, that there were errors or mistakes on the face of the record which state:-

(a) that there was a valid rescission of the Sale Agreement dated 10th May, 1989.

(b) that the respondent had obtained absolute and indefeasible title,

(c) that the orders issued on 25/7/1991, 25/9/1991 and 9/10/1991 respectively related to the original land L.R. No. 10902/1 and so the orders were not effectual in respect of L.R. No. 10902/9;

and

(d) that there is no concrete evidence that Equity was aware of the previous sale between the defendant and the administrators of the estate.

The application was supported by the affidavit deponed to by *Stanley Kirima Mbagine*, the chairman of the appellant company, in which he essentially deposed the averments which are given hereinabove as grounds in support of the application.

In his reserved ruling the learned Judge held that the ruling dated 24th February, 1993 was an interlocutory ruling in an application for injunction and that the facts therein were not decisive on their own and had to be considered in relation to the appellant's counter-claim in HCCC No. 5992 of 1992. Moreover, the issue of the cancellation of the sub-division, the consented transfer to the respondent by *Mary Wamuhu Muigai,* and, whether there existed fraud on the part of the respondent or not was a matter which had been made issue NO. 8 in the judgment sought to be reviewed and moreover the issue had arisen during the trial and the same was considered and a decision made on it. The learned Judge was satisfied that it did not constitute a new matter or evidence as it had been fully canvassed before him.

The learned Judge further held that the alleged errors or mistakes said to be apparent on the record were in fact his findings which he had arrived at after full consideration of all evidence tendered in court, including documentary evidence and submissions by counsel. He held:-

"*The court made the findings complained of after full trial and after due consideration of the evidence and records of existing suits. The finding of the court were on the merits…*

The mistake or errors alleged to have been committed by the court are not mistakes or errors envisaged in order XLIV of the Civil Procedure Rules……..…"

By its memorandum of appeal the appellant has averred, firstly, that the learned Judge had exercised his discretion injudiciously by refusing to review the decree passed on 29th September, 1999 in the light of the errors or mistakes on the record and which had been clearly pointed out by the appellant; and secondly, that by refusing to do so he had occasioned the appellant injustice.

Mr. Ndege counsel for the appellant averred that it was incumbent upon the learned Judge to make consistent findings both in his interlocutory and final decisions. He submitted that in making his final judgment the learned Judge did not look at his earlier decision and thus made inconsistent findings. For example, *Mr. Ndege* argued, the finding that the members of the appellant were already in the land was not considered in the final judgment and yet the learned Judge had held so in his earlier ruling.

It is trite law, and we reiterate, that a review may be granted whenever the Court considers that it is 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 can it be a ground of 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. See *NAIROBI CITY COUNCIL VS. THABITI ENTERPRISES LTD [1995-98] 2EA 251 (CAK).*

In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.

We are satisfied on consideration of all the submissions tendered before us that there was no discovery of a new and important matter or evidence which, after due diligence, was not within the knowledge of the appellant at the time the judgment and decree were passed. We are also satisfied that there was no error apparent on the face of the record or any other sufficient reason to justify review.

We think that the learned Judge in the court below cannot be faulted and for these reasons we do not find any merit in this appeal which we hereby dismiss with costs.

DATED and DELIVERED at NAIROBI this 13TH day of July, 2007.

P.K. TUNOI

……

JUDGE OF APPEAL

S.E.O. BOSIRE

……

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR