



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OMOLO, O’KUBASU & GITHINJI, JJ.A)**

**CIVIL APPEAL 149 OF 2001**

**BETWEEN**

**FRANCIS ORIGO .....1ST APPELLANT**

**PETER PANYAKO .....2ND APPELLANT**

**AND**

**JACOB KUMALI MUNGALA .....RESPONDENT**

**(An Appeal from the Ruling of the High Court at Nairobi in Eldoret (Visram, Comm. of Assize)  
dated 20th November, 2000 in H.C.C. Appeal No. 10 of 1980)**

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the learned Commissioner of Assize, A. Visram (as he then was) delivered on **6th March, 2001** in which he dismissed the appellants’ application for review. This is an appeal with a long history. The appeal relates to a piece of land known as **Chepsaita Settlement Scheme/35** (“the suit land”) measuring about 62 acres or thereabout. This piece of land was purchased from a lady known as **Roda Jepkosgei**. It has been the appellant’s contention that they contributed towards the purchase price but the title was issued in the name of the respondent, **Jacob Kumali Mungala**. With the title in his name, the respondent instituted a civil case in the Resident Magistrate’s Court in which he sought an eviction order against the appellants, **Francis Origo** and **Peter Panyako**. The eviction suit was heard and determined by the then Resident Magistrate, Mr. E.F. Aragon who found in favour of the respondent and ordered that appellants be evicted from the suit land.

Being dissatisfied by that decision, the appellants filed an appeal which was based on the ground that during the hearing of the suit in the Resident Magistrate’s Court, Mr. Mukele, the then advocate for the appellants, had applied for adjournment in order to call Roda, (the seller of the suit land) who was sick

but that application for adjournment was refused. It would appear that was the beginning of the appellants' problems. The appellants' appeal was heard by Mead J. who dismissed it on 31st January, 1981. In dismissing the appellants' appeal, the learned Judge stated as follows in concluding his judgment:-

***“Even accepting which I do not, that the appellants agreed that the said land should be registered solely in the respondent’s name and that he should hold the said land as a trustee for himself, and the appellants that transaction became void for non-compliance with the provisions of section 6(1) of the Land control Act. Gichuhi Farmers Company Limited vs. Gichamba and Another (1973) E.A.8. As the learned resident magistrate aptly observed there was nothing to prevent the appellants and the respondent from executing a document evidencing the trust.***

***I dismiss the appellant’s appeal. Costs to the respondent.”***

Still dissatisfied with that judgment of the High Court, the appellants filed an appeal in the Court of Appeal, but their notice of appeal was filed out of time. That notice of appeal led to the striking out of the appellants' appeal. The order of the Court of Appeal was made on 28th December, 1983 and for the sake of completeness the extracted order of the Court of Appeal read as follows:-

***“UPON READING a consent letter dated 21st November, 1983 from M/s Khaminwa & Khaminwa advocates and M/s Nyairo, Tunoi & Company Advocates IT IS ORDERED BY CONSENT that this appeal be and is hereby struck off with costs to the respondent.”***

It seemed as if the appellants' fate had been sealed by that order of 28th December, 1983. But that was not to be so since the appellants were still determined to pursue the matter. They decided to file a notice of motion in the High Court pursuant to **Order XLIV rules 1, 2, 3** and 4 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. That notice of motion was brought on the following grounds:-

***(a) THAT the land parcel number UG/CHEPSAITA SETTLEMENT SCHEME/35 measuring 62 acres (26 hectares) or thereabout is the property of the Appellants and the Respondent having purchased the same jointly, the registration of the same in the name of the Respondent alone notwithstanding.***

***(b) THAT the said parcel of land was bought from RHODAH JEPKOSGEI whose evidence was never taken at the trial in Eldoret Resident Magistrate’s Civil Suit No. 920 of 1979. The said Rhodah Jepkosgei is still alive and her evidence in this mater was crucial to the fair and just determination of the question of Purchase and ownership of Land Parcel number 35 Chepsaita Settlement Scheme. The learned trial Magistrate erred gravely in peremptorily denying the Appellants the opportunity to call her to testify on their behalf and this failure violated basis (sic) principles of natural Justice which resulted in a manifest and clear miscarriage of Justice which no Court of Equity can condone.***

***(c) THAT Justice and equity demands that there be a full review of the decision in Eldoret HCCCA NO. 10 of 1980 to the extent that the orders therein be set aside by allowing the appeal and a fresh trial before a subordinate Court or the High Court be ordered.***

***(d) THAT the Appellate Judge failed to consider and to find that the subject matter of the claim in the suit before the trial Magistrate was beyond the Civil Jurisdiction of that Court and that the trial Judgment and orders therein are a nullity.”***

It was that notice of motion that the learned Commissioner of Assize considered and finally dismissed. In dismissing the appellants' application for review the learned

Commissioner of Assize stated: -

***“This application has been brought twenty years after the judgment and order sought to be reviewed were made. It does not only offend the principle that there must be an end to litigation but it is also brought after inordinate and unreasonable delay. By no stretch of imagination can a 20 year delay be regarded as “reasonable” considering that the reasons for the delay were poor legal advice and extra judicial interference.***

***Time is now propitious to put this litigation to a permanent end, and not to vex the Respondent forever.”***

It is from that decision of the learned Commissioner of Assize (as he then was) that the appellants have filed this appeal citing the following seven grounds of appeal: -

***1. THAT the learned Judge erred in law and fact and gravely misdirected himself in finding that the aborted Civil Appeal No. 58 of 1981 in the Court of Appeal at Nairobi arising from the Judgment of the honourable Mr. Justice Mead dated 31st January 1981 in Eldoret High Court Civil Appeal no. 10 of 1981 (having been withdrawn by consent of the parties on the ground that no valid notice of Appeal had been filed and having been struck out Pursuant to the Provisions of Rule 93(3) of the Court of Appeal Rules without their Lordships, the Honourable Justices of Appeal, having thus addressed themselves to and examined the merits or demerits of the aborted Appeal) the same operated as an “Appeal” for purposes of the Provisions of Order XLIV of the Civil Procedure Rules so as to bar the Appellants from instituting an application for the review of the Judgment and Orders of the High Court in Civil Appeal No. 10 of 1980 and in thus holding that the Notice of Motion for review dated 31st March 2000 had no bias as it was incompetent.***

***The finding of the learned Judge ought to have been that an appeal incompetent ab initio is not an appeal for purposes of Order XLIV of the Civil Procedure Rules and the same does not bar a motion for review.***

***2. THAT the learned Judge erred in law and fact in failing to find that the blunt and unreasonable refusal by the learned trial Magistrate to accord the Appellants an opportunity to call a key and crucial witness, RODA JEPKOSGEI, to testify on their behalf at the trial and the apparent failure by the Appellate Judge (the Honourable Mr. Justice Mead) to rebuke and reverse the Magistrate’s findings and to proceed to draw adverse inferences against the Appellants in his judgment for lack of the evidence of RODA JEPKOSGEI constituted sufficient ground in the interest of Justice and fair play to warrant the review and reversal of the Judgment and Orders of the Honourable Mr. Justice Mead. This failure has occasioned monstrous and intolerable miscarriage of Justice.***

***3. THAT the learned Judge erred in law and fact and misdirected himself in holding that an issue which affords a party a good ground of Appeal does not afford the same party a good ground for review.***

***4. THAT the learned Judge erred in law and fact in being overwhelmed by the 20 years or so of delay in instituting the notice of Motion for review and in failing to appreciate the history of the dispute including the spirited and forceful intervention in the matter by Senior Officers in the Provincial Administration and the office of the Honourable Attorney-General who clearly led the Appellants reasonably though erroneously to believe that the dispute would be resolved outside the courtrooms and in some cases the lapses by way of legal advice preferred to the Appellants and in failing to find that the delay did not adversely prejudice any party to the Proceedings.***

***5. THAT the learned Judge erred in law and fact and manifested clear bias against the***

*Appellants by pontificating about the virtues of bringing this litigating to an end without in any way showing even remotely any appreciation of the importance nay the reverence with which citizens in this country including the Appellants hold land and the length they are prepared to travel within the confines of the law to prove that the land in dispute rightly belongs to them. It is unfair and unjust for the learned Judge to pour scorn on such endeavours on the part of the Appellants in pursuing what they perceive to be their right.*

**6. THAT the learned Judge erred in law and fact in his reading and application of the Principles laid down in the case of *DYER – VSDYER (1788)*, 2 COX Eq. Cas. 92 cited within approval in *PETTIT* [www.kenyalaw.org](http://www.kenyalaw.org) Francis Origo & another v Jacob Kumali Mungala [2005] eKLR 6 -VS- *PETTIT* [1970] AC 777, H. Lordships; [1969] 2 ALL. E. R. 385 to the effect that without a single exception the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchasers; whether in one name or several; whether jointly or successive – results to the man who advances the purchase money and fell in the same trap as the learned trial Magistrate and the learned Appellate Judge in holding that a resulting trust brought about by legal declaration constitutes a transaction within the ambit and scope of the Provisions of the Land Control Act. This error has occasioned grave miscarriage of Justice.**

**7. THAT the learned Judge ought to have found that as the Appellants contributed substantial funds towards the purchase of the land Parcel L. R. NO. UG/CHEPSAITA SETTLEMENT SCHEME/35 and having taken possession of the same in those circumstances for a long time indeed there was resulting trust in their favour and that they had an equity in the land which equity was not in anyway hampered by the Provisions of the Land Control Act.”**

This appeal was argued with considerable force and clarity by Mr. Machio, who appeared for both appellants. Mr. Momanyi, appearing for the respondent, was equally forceful and clear in presenting the case for his client.

We have endeavoured to give a brief background to this appeal in a bid to set the record straight. What we have stated in that brief background is not in dispute.

It was Mr. Machio’s submission that the learned Commissioner of Assize erred when he relied on the decision in **Ujagar Singh v. Runda Coffee Estates [1966] E.A. 263** since in the present appeal the appellants had withdrawn their appeal so that there was no valid appeal before the Court of Appeal when the application for review was filed. Let us now consider what was before the superior court. It was a notice of motion seeking review of a judgment. That application was brought under (and is governed by) **Order XLIV rule 1 of the Civil Procedure Rules** which provides: -

**“1. (I) 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.”**

From the foregoing, it is clear that an applicant has to show that there has 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 or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay. In the present appeal it cannot be denied that the application for review was made after a period of 20 years! Clearly, that was a long delay. Even if the delay was to be ignored what was the main reason for the review sought? From the history of this long litigation it would appear that things started going bad for the appellants when their advocate's application for adjournment to call a witness known as Roda was refused. It has always been their contention that they were denied the opportunity to call a crucial witness. But the issue of this crucial witness can hardly be described as discovery of new and important evidence. The appellants did not show that they had discovered a new witness. The witness existed and was known to the parties.

Going back to **Order XLIV rule 1(1)(a)** of the **Civil Procedure Rules**, it is to be observed that the rule talks of any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred. In the present appeal, the appellants preferred an appeal first from the Magistrate's Court to the High Court and then to the Court of Appeal by filing a notice of appeal. Their appeal was however struck out since the notice of appeal had been filed out of time. A similar situation arose in **Kisya Investments Ltd. v. Attorney General and R.L. Odupoy Civil Appeal No. 31 of 1995 (unreported)** in which this Court said: -

*“The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law. The correct position appears to us to be as set out by Sarkar on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows: The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end ..... Review application should be filed before the appeal is lodged. It is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with ..... A review application is incompetent after appeal is preferred.”*

Not only did the appellants file a notice of appeal, but they actually filed the record of appeal which was subsequently disposed of by being struck out, albeit by consent. In view of the foregoing, this appeal's fate is sealed.

We really sympathize with the appellant's state of affairs but it would appear that their tribulations started when they embarked on a fruitless and futile exercise of engaging in a plethora of correspondence involving politicians and members of the Provincial Administration. The appellants' earlier advocates were also to blame to some extent but we commend Mr. Machio for his valiant efforts in trying to rescue the appellants from this long painful predicament.

Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.

As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellants' application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.

*Dated and delivered at Eldoret this 14th day of October,2005*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**