IN THE COURT OF APPEAL

AT KISUMU

(Coram: Tunoi, Lakha & O'Kubasu JJ A)

CIVIL APPEAL NO 347 OF 2000

JOSHUA OTIENO BUYU……..…..APPELLANT

VERSUS

PETRO OCHIENG WASAMBWA……..….RESPONDENT

(Appeal from an order of the High Court of Kenya at Kisumu

(Wambilyangah J) dated 22nd day of May, 2000 in

HCCC No 124 of 1997)

JUDGMENT

This is an appeal from the ruling of Wambilyangah J delivered on 22nd May, 2000 in which he dismissed the appellant's application for a review of his earlier judgment.

The dispute herein was commenced by way of a plaint in which the respondent, Petro Ochieng Wasambwa , was the plaintiff and the appellant, Joshua Otieno Buyu, was the defendant. The relevant paragraphs of the plaint stated as follows:-

"3. At all material times the plaintiff was and is the registered owner of all that piece of land known as Kisumu/Manyatta "A"/3161 measuring 0.03 Ha and thereabouts.

4. On or about 1993 the defendant has illegally and without any right or colour entered into the said piece of land and started constructing structures thereon.

5. The defendant has gone further to claim that the said piece of land belongs to him.

6. Despite demand notice to vacate, the defendant has refused to comply.

7. As a result of the reasons aforesaid, the plaintiff has suffered loss and damage.

8. The plaintiff now prays for permanent injunction restraining the defendant from continued illegal occupation of the said piece of land and his eviction therefrom."

A defence was filed and in it the defendant (the appellant herein) averred:

"3. The defendant admits having sold the land known as Kisumu/Manyatta "A"/3161 to the plaintiff but denies that the same measured 0.03 Ha as alleged in the plaint and will put the plaintiff to strict proof thereof.

4. The defendant avers that the portion of the aforesaid property sold to the plaintiff measured only 36x48 as stipulated in the agreement of sale.

5. The defendant denies the contents of paragraph 4 of the plaint and avers that the only structure belonging to him nearest to the plaintiff's aforesaid property is a house which was there even before the sale took place as it was constructed in 1986.

6. The defendant denies the contents of paragraphs 5,6,7 and 8 of the plaint and will put the plaintiff to strict proof thereof.

7. The defendant avers that the plaintiff's claim does not disclose any reasonable cause of action and is an abuse of court process and will at the first instance seek to have the same struck out on that ground." When the suit came up for hearing before Wambilyangah J on 1st October, 1998, the plaintiff (respondent in this appeal) gave brief testimony which was followed by a consent order in the following terms:-

"By consent it is ordered that the Land Registrar Kisumu District shall visit the disputed land and ascertain its boundaries *vis-a-vis* Kisumu/Manyatta A/1787. He will do so in the presence of the District Surveyor. The plaintiff shall pay all the expenses of the District Land Registrar – which shall be treated as costs in the cause.

The Land Registrar shall then file his report in court by 2nd November 1998. Mention on 10th November 1998 for further orders."

The record of the superior court shows that the case was mentioned on 10th November, 1998 but nothing happened. There were numerous mentions until 20th July 1999 when it is recorded that Mr Athunga, counsel for the plaintiff addressed the court as follows:-

"There is a report of Land Registrar pursuant to the court order. The defendant's house is on the land owned by and registered in the name of the plaintiff." Pursuant to the foregoing, the learned judge entered judgment in favour of the plaintiff in the following terms:-

"I give judgment to the plaintiff as prayed in the plaintiff (sic) with costs."

Being aggrieved by that judgment, the defendant (the appellant herein) took out a Notice of Motion under "Sections 3A, 63 and 80 of the Civil Procedure Act and order 39 rules 1,2 and 3 of the Civil procedure Rules and order 50 rule 2 of the Civil Procedure Rules" seeking, among other reliefs, a review and setting aside of the judgment. That Notice of Motion was heard on 28th February 2000 and a ruling delivered by the same judge (Wambilyangah J) on 22nd May 2000. It is that ruling that provoked this appeal.

When the appeal came up for hearing before us on 11th June, 2003, Mr Odunga, for the appellant, submitted that as the judgment of the learned judge of the superior court was based on the report of the District Land Registrar that rendered the whole proceedings a nullity in law. It was Mr Odunga's view that as there was error on the face of the record the application for review ought to have been allowed. He therefore asked us to allow this appeal and refer the matter back to the superior court.

In resisting this appeal Mr Olel, for the respondent, told us that the application for review was incompetent as there was no order attached to the application. He went on to argue that the grounds for review as set out in order XLIV of the Civil Procedure Rules were not satisfied. He urged us to dismiss this appeal with costs.

As we consider the arguments advanced by counsel appearing for both parties, it would be convenient to go back to the Notice of Motion seeking review of judgment. The Notice of Motion was stated to have been brought under "sections 3A, 63 and 80 of the Civil Procedure Act, order XXXIX rules 1,2 and 3 of the Civil Procedure Rules, order L rule 2 of the Civil Procedure Rules." The appellant was seeking a review of judgment. Even if the application was not brought under the correct provisions of the law, that would not be fatal to the application in view of order L rule 12 of the Civil Procedure Rules which provides:-

"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

That being the position, we are satisfied that although the appellant failed to state the correct provision of the law under which the application for review was made that omission was not fatal to the application.

Since the appellant was asking for review, we take it that the application was made under order XLIV rule 1(1) of the Civil Procedure Rules which provides:-

"1.(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 suffient 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."

In an application for review, an applicant has to show that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or any other sufficient reason.

In this appeal Mr Odunga's main ground was that there was error on the face of the record.

We have carefully considered the background to this dispute leading to the judgment which was entered and the ruling on application for review but we are unable to say that the learned judge of the superior court can be faulted in rejecting application for review in his ruling delivered on 22nd May, 2000. On our part, all we can say is that the appellant might have had an arguable appeal had he filed an appeal against the one line judgment of 20th July, 1999 but the route chosen (application for review) was certainly the wrong one.

That being our view of this appeal, it follows that this appeal must and is hereby dismissed with costs.

Dated and Delivered at Kisumu this 13th day of June, 2003

P.K.TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR