Ndirangu v Ndiritu (Civil Appeal E081 of 2024)
[2025] KEHC 7334 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E081 OF 2024

DKN MAGARE, J

MAY 27, 2025

BETWEEN

JOSEPH NDUNGU NDIRANGU ..... APPELLANT

AND

GEORGE KARIRU NDIRITU ..... RESPONDENT

(Appeal from the Ruling and Order of Honourable Elena Nderitu, Chief Magistrate delivered in Nyeri CMCC No. E220 of 2022 on 21.11.2024.)

JUDGMENT

1. This is an appeal from the Ruling and Order of Honourable Elena Nderitu, Chief Magistrate delivered in Nyeri CMCC No. E220 of 2022 on 21.11.2024.
2. In the Memorandum of Appeal dated 10.12.2024, the Appellant raised the following Grounds of Appeal:
    a. The learned magistrate erred in law and fact in revisiting, reviewing and setting aside orders of 15.11.2023 that sustained the Appellant's Preliminary Objection dismissing the suit and by so doing reinstated a nullity and acted without jurisdiction as the court was functus officio.
    b. The leaned magistrate erred in law and fact by misapprehending and misapplying the *Limitation of Actions Act* which did not provide for extension of time in contracts.
3. The impugned ruling arose from the application by the Respondent dated 1.7.2024 materially seeking to review the Ruling and Order of Hon. Kibiru, Chief Magistrate, dated 15.11.2023.
4. The application was premised on the grounds that the Appellant concealed material facts from court that the cause of action arose when Appellant refused to refund Ksh. 145,000/= plus interest per contract.

5. On the other hand, the Appellant's case was that the application was an attempt to have the court sit on an appeal against the ruling of the court of equal status. That the court was functus officio having pronounced itself.

Analysis.

6. The issue for my determination is whether the lower court erred in setting aside the ruling and order dated 15.11.2023.

7. The jurisdiction of this court to grant review is well set out in the law. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

8. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

> " (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

9. The rationale for the discretionary power of review is to find whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. This power is inherent in every court of plenary jurisdiction and is premised on preventing miscarriage of justice or an injustice. I associate

myself with the reasoning of Kuloba J (as he then was) in Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

10. The Respondent herein sought to set aside the previous orders that had been made without his knowledge or consent and to have the case heard afresh. It was his case that the Appellant misrepresented when cause of action arose. That the agreement was entered up to on 11.6.2013 and he paid Ksh. 145,000/= leaving a balance of Ksh. 25,000/=. The Appellant rescinded the agreement on 13.11.2026 and advised the Respondent to go for refund of his money paid.

11. The Appellant did not respond to these assertions. The Appellant's main concern in his Replying Affidavit sworn on 26.9.2024 was that the application was a second bite on the cherry. That the court was functus officio on rendering the ruling of 15.11.2023 and that the application was a disguised appeal.

12. The circumstances of this case raises an error that can be reviewed within the meaning of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The position is that the underlying cause of action in the suit was that the Appellant and the Respondent entered into a sale agreement and the Appellant subsequently rescinded the agreement but declined to refund the purchase price. This factual position was asserted by the Respondent and not disputed by the Appellant. It is also the undisputed position of the Respondent that this fact was not brought to the attention of the lower court when rendering that ruling of 15.11.2023. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

13. Therefore, I am of the view, like did the lower court in the ruling of 20.11.2024 that had the fact in the Appellant's Advocate's letters of 13.10.2016 and 16.11.2016 regarding rescinding the agreement

been brought to the attention of the lower court, the court would not have held vide the ruling of 15.11.2023 that the cause of action occurred when the contract was signed on 11.6.2023. In the case of Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR it was held that: -

> " In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

14. The lower court thus exercised its powers within the limits of the statute in allowing the Respondent's application. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

15. More importantly, vide the documents filed in court, admitted a debt of Ksh. 169,000/= on 13.10.2016. By dint of that the course of action arose upon receipt of the letter dated 13.10.2016. By the court going into issues of the validity of the agreement dated June 2016, the court made an error which is apparent on the face of the record. The respondent did not seek to enforce the sale agreement but the amount under the rescission notice. The notice was clear that the rescission date of 28.10.2016.

16. The rescission and the payment of the refund were the relevant dates. Time had not run out for filing of the suit in the court below. The court also exercised its unfettered discretion within the bounds of the law to correct an error that was apparent on the face of the record. Otherwise, it would be capricious and whimsical and defeat the very purpose of serving justice that the law is set to achieve. There was no dispute or breach before 28.10.2016. In the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> " Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
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> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to

'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

17. In the case of South Nyanza Sugar Co Ltd v Doo (Civil Appeal E065 of 2021) [2023] KEHC 23583 (KLR) (12 October 2023) (Judgment), Wendoh J held as follows;

> 17. Section 4 (1) of the *Limitation of Actions Act* provides as follows in relation to actions on contracts, tort and certain other actions: -"The following actions may not be brought after the end of six years from the date on which the cause of action accrued -a.actions founded on contract..."
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> 18.As provided by Statute, actions relating to contracts can only be brought to court before the lapse of six years from the time when the cause of action accrued. According to Black's Law Dictionary (10th Edition) the word "accrue" means "to come into existence as an enforceable claim or right." Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said that time started running.
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> 19.The Court of Appeal in Maersk Kenya Limited v Murabu Chaka Tsuma (2017) eKLR had an occasion to discuss when a cause of action accrues as follows:-"In determining whether the claim filed by the respondent was time barred, it is not in dispute that the cause of action arose on 20th November 2006 when the respondent was dismissed from employment. It is also not in dispute that the cause of action arose prior to the enactment of the *Employment Act*, 2007, so that in computing whether the suit was time barred, the applicable law was section 4 (1) (a) of the *Limitation of Actions Act* which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.When six years is computed from when the cause of action arose on November 20, 2006, there is no question that the suit ought to have been filed latest before November 19, 2012. Instead it was filed four months later on March 21, 2013." (emphasis mine)
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> 20.This court, constituted differently, has dealt with this issue. Mrima J in the case of South Nyanza Sugar Company Limited v Diskson Aoro Owuor (2017) eKLR held: -"There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period."

18. Given the foregoing, I will take the position of the *Limitation of Actions Act*. It will not make sense for a party to sue before breach occurs. In this case, the original claim was a valid contract for sale of land for which there was no breach. The Respondent had 12 years to make his claims. He was also in possession from the pleadings on record. Breach occurred when rescission occurred.

19. The Appellant rescinded the same effective 28.10.2016. They buttressed the rescission through pleadings and witness statements that admitted the debt. I find and hold that the decision of the court allowing the application for review was proper. The appeal lacks merit and is accordingly dismissed.

20. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

21. As to costs, the Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

22. Although the Respondent would be entitled to the costs, they did not participate in the appeal. Each party shall bear their own costs.

23. In the circumstances, I am inclined to dismiss the appeal.

Determination.

24. The upshot of the foregoing is that I make the following orders:

a. The appeal lacks merit and is dismissed.

b. In the circumstances, each party shall bear their own cost of the appeal.

DELIVERED, DATED AND **SIGNED** AT **NYERI** ON THIS **27TH** DAY OF **MAY, 2025 JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Michael