IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox JA, Chesoni & Nyarangi Ag JJA)

CIVIL APPEAL NO. 53 OF 1984

BETWEEN

PHILIP OCHILO.....APPELLANT

AND

AMBROSE SEKO.....RESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT

On January 2, 1980 the appellant as plaintiff filed a suit against the respondent as defendant seeking an eviction order against the defendant. The appellant claimed that the respondent had wrongfully occupied his parcel of land and enclosed it. The trial magistrate viewed the disputed parcel of land on June 14, 1980 in the presence of the appellant and the respondent and noticed three narrow strips of land on which maize was then growing and which were said to belong respectively to Soake Omolo, Chacha Orero and Olal Orero. The trial magistrate decided without hearing the appellant and the original defendant and the three persons that as the cultivation by the three persons was adverse to the interests of the original defendant, the three had to be joined as defendants. In the course of the hearing it became clear that the trial magistrate had earlier on heard the suit in Case No 13/71 of Suba Kuria African Court whose parties were the elder brother of the respondent and the appellant's father. The trial magistrate viewed the land, the subject matter of case No 13/71 but:

"did not walk up to the area in dispute".

After hearing and considering the evidence, the trial magistrate dismissed the appellant's suit and condemned the second, third and fourth defendants to pay the costs of the suit to the first defendant.

The appellant's appeal to the High Court (Scriven J as he then was) was summarily rejected on May 19, 1981 no doubt under section 79B of the Civil Procedure Act. On June 20, 1983, the appellant moved the High Court (Schofield J) by way of a notice of motion under section 80 of the Civil Procedure Act and under order XLIV rule 1 for the court to grant a review of Scriven J's order, set aside the summary rejection and admit the appeal to hearing. Schofield J refused to grant the application and dismissed the application. This appeal is against the decision of Schofield J.

Mr Opiacha for the appellant argued that section 80 of the Civil Procedure Act sets no time limit, that order XLIV rule 1 covers several matters and that the review sought was against the summary rejection. The respondent did not appear and was not represented although there was evidence of return of valid service of hearing.

Section 79B of the Civil Procedure Act empowers a judge of the High Court to peruse the record of an appeal from the subordinate court and if he considers that there is no sufficient ground for interfering with the decree, part of the decree or order appealed against, he may reject the appeal summarily. The power should be used most carefully and as was stated in *Peter Nzioki & Kivilu Musimi v Kitusa* Civil Appeal No 54 of 1982 (unreported), only in the clearest case such as an appeal based wholly on matters of fact upon which proper findings will have been made. The appellant's memorandum of appeal bristles with substantial grounds of law such as whether the trial magistrate should have disqualified himself from hearing the suit and if the joining of three other defendants prejudiced the appellant's case. The summary rejection of the appeal was erroneous.

Schofield J misread order XLIV rule 1 in as much as the order permits a review of a judgment by a court where new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Schofield J excluded himself from exercising his discretion because of his erroneous view of order XLIV rule 1.

I would allow the appeal and set aside the order dismissing the application for a review. I would remit the proceedings to the High Court so that the application by notice of motion under section 80 of the Civil Procedure Act and order XLIV rule 1 for a review may be heard according to law.

I would award the appellant his costs of the appeal.

Hancox JA. I agree with the judgment of Nyarangi Ag JA which I have had the advantage of reading in draft.

Scriven J's order of May 10, 1981 was appealable but no appeal to this court was preferred. Therefore the case falls within section 80(a) of the Civil Procedure Act and was capable of being reviewed under that section.

Secondly, the judge only recited one reason for which a review may be sought under order XLIV rule 1(1) but there are two others, namely an error or mistake apparent on the face of the record, or "any other sufficient reason". The judge therefore precluded himself from exercising his discretion whether to review Scriven J's order or not, even though he indicated that the two years' delay could be a material factor in his decision.

Accordingly the appeal should be allowed with costs. There will be an order in the terms proposed by Nyarangi Ag JA.

Chesoni JA. In this appeal the learned judge gave too narrow an interpretation to both section 80 and order XLIV rule 1 of the Civil Procedure Act and Rules respectively. Section 80 is not limited to cases where the applicant is unable to appeal, for a party who has a right to appeal but has not preferred any appeal may apply for review under subparagraph (1) of section 80. As to order XLIV rule (1) a person who considers himself aggrieved may apply for review of the judgment to the court that passed the decree or made an order because of any one of the following three reasons:

a) there is a discovery of new and important matter or 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 decree was passed or the order made; or

b) there is some mistake or error apparent on the face of the records or

c) for any other sufficient reason.

Again, like in the case of section 80, under order XLIV rule 1 the aggrieved person may apply where an appeal is allowed by the decree or order, but where no appeal has been preferred.

The learned judge precluded himself from properly exercising the discretion conferred on the court by the two provisions of the Civil Procedure Act and Rules. The judge was entitled to take into account the delay by the applicant to apply for a review, but that delay was not declared to be inordinate.

As the ground for declining to review Scriven J's judgment was in my view incorrect in law as I agree with Nyarangi Ag JA's judgment the draft of which I had the advantage of reading that we should allow this appeal, set aside the High Court order dismissing the application and remit the proceedings back to the High Court for the application for the review to be heard according to the law. I would award the appellant the costs of this appeal.

Dated and Delivered at Kisumu this 10th day of December 1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

AG. J.O.NYARANGI

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JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR