Case Number:	Civil Appeal 201 of 2012
Date Delivered:	11 May 2018
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Milton Stephen Asike-Makhandia, William Ouko
Citation:	Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & another [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Environment and Land Case 666 of 2007
Case Outcome:	Appeal Dismissed with Costs.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE & MAKHANDIA & OUKO, JJ.A)

CIVIL APPEAL NO. 201 OF 2012

BETWEEN

STEPHEN WANYOIKE KINUTHIA *(Suing on behalf*

***of John Kinuthia Marega (deceased)*.....APPELLANT**

AND

KARIUKI MAREGA.....1ST RESPONDENT

PETER MUNGAI.....2ND RESPONDENT

(*An appeal from the Ruling and Order of the Environment and*

Land Court of Kenya at Nairobi by (Nyamweya J)

dated 19th June 2012

in

ELC No. 666 of 2007)

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JUDGMENT OF THE COURT

The matter giving rise to this appeal revolves around a family dispute over the ownership of **PLOT NO. GITHUNGURI/GATHIEKO/412,** the suit property. The dispute can be traced back to the death of John Kinuthia Marega on 13th July, 1992. A few years after his death, his brothers, the respondents on the one hand and his nephew, the appellant, on the other hand disagreed over the ownership of the suit property. In the year 2001, the appellant alleged that the respondents destroyed the fence de-alienating the boundaries between the suit property and **GITHUNGURI/GATHIEKO/373** (both previously identified as **LR. No. GITHUNGURI/GATHIEKO/179**) and in the process illegally appropriated approximately one acre of the suit property. While the appellant insisted that the suit property belonged to his late father and that the respondents, without any colour of right occupied it using a forged court order which purportedly also barred the appellant from accessing the suit property. The respondents maintain that on 16th May, 1989 the original title to the suit property along with others were cancelled, pursuant to an order issued by the High Court on 25th October, 1988 in HCCC No. 1327 of 1978. They also averred that following the cancellation, the original parcel, **LR No. GITHUNGURI/GATHIEKO/179** was resurveyed and new titles issued.

It is important to note that the suit property is situated in the present day Kiambu County; that the action giving rise to this appeal was filed in Nairobi in 2002 and that, although pleadings were closed sometime in the year 2003, the hearing of the action took many years to commence. When the hearing finally commenced, it was in Kericho High Court, the file having been transferred to that station by an order of the Deputy Registrar on 16th March, 2009. Apparently, the trial Judge (Angawa, J.) had been transferred to Kericho. What is more intriguing is the fact that at the time the file was being transferred to Kericho, not a single witness had been heard by Angawa, J. It is the events that took place in Kericho that has precipitated this appeal.

On 28th May, 2009, after two adjournments on account of the absence of the respondents, the hearing began with the appellant himself, first taking the witness stand. He called two other witnesses and closed his case. The learned Judge, in her decision rendered at Kericho on 8th June, 2009 found that the respondents, using force had trespassed on the suit property; that the appellant was entitled to orders of permanent and mandatory injunction, directing that the respondents be evicted from the suit property and permanently restrained from accessing it thereafter. The Judge also awarded to the appellant Kshs. 500,000 in general damages.

Shortly after this judgment the respondents took out a chamber summons praying that the execution of the decree be stayed and that the *ex parte* judgment be set aside. In determining the application, Muchelule, J, having set out the relevant decided cases, which we shall advert to shortly, was convinced that the statement of defence filed by respondents raised triable issues. He further took into account the fact that the parties are related, that the dispute concerns ancestral land, and that there was no evidence that the respondents' counsel was served with the hearing notice. In the interest of justice, therefore, the learned Judge set aside the judgment and all consequential orders so as to;

"….accord an opportunity to the parties to put their case before the court and a determination made one way or the other…...the case be given priority date for hearing…"

It was the appellant's turn to be aggrieved. He applied by a motion on notice to the High Court to review, vary or set aside the orders made by Muchelule, J and to reinstate the judgment entered by Angawa, J. This time the matter fell before Nyamweya, J for consideration and determination. In her ruling after hearing arguments, from the respective parties, she found that the application had not met the threshold under **Order XLIV** of the Civil Procedure Rules, in that there was no new and important evidence that was presented because the proceedings and outcomes in H.C.C.C No. 1327 of 1978, HCMA No. 179 of 2004, HCMA No. 1056 of 2003 and H.C. Succession Cause No. 1672 of 2008, were all irrelevant to the matters that were determined by Muchelule, J; and that these cases were all along within the appellant's knowledge. Secondly, the learned Judge did not find any error apparent on the face of the record. Finally, the learned Judge was of the view that what the application sought from her was incapable of being achieved by way of review; and that the application amounted to asking her to sit on appeal over the decision of a judge of coordinate jurisdiction. With costs the application was dismissed, hence this appeal.

The appellant has listed 19 grounds in the memorandum of appeal. In our estimation, the grounds amount to no more than these; that, contrary to the finding of the learned Judge, the appellant's evidence before Angawa, J could not be rebutted; the learned Judge misapplied the provisions of **Order XLIV Rule 1 (1)** of the Civil Procedure Rules (repealed) but instead used **Order 45** of the 2010 Rules; that the court ignored submissions and binding authorities cited in support of the appellant's arguments and instead, used irrelevant decisions to arrive at an erroneous outcome; that the Judge failed to consider the findings in the many matters relating to the suit property and how they impacted on her decision; and that the Judge ought to have found that the respondents were aware of the hearing date.

Under the original **Order IXB rule 3** (currently **Order 12, rule 2)**, if on the day fixed for hearing only the plaintiff attends and the court is satisfied that the hearing notice was duly served, it may proceed to hear the case *ex parte.* But if the hearing notice was not duly served or not served in sufficient time, the court may adjourn the hearing. This confirms the firmly settled law, as correctly articulated by the two judges in the court below, that whether to set aside a judgment or review a ruling is a matter of absolute judicial discretion limited only by the justice of the case concerned. **Order IXB rule 8** of the repealed Civil Procedure Rules stipulates this principle as follows;

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

Authorities on the guiding principle are legion with the *locus classicus* being **Shah v. Mbogo & Anor.** (1966) EA 116 where Harris J. explained it as follows;

"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained *ex-parte*. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice…"

The principle was reiterated by Sir William Duffus, P in **Patel vs. E.A Cargo handling Services Ltd** (1974) E.A. 75 saying:-

"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given by the rules. I agree that where it is a regular Judgment as it is the case here, the court will not usually set aside the Judgment unless it is satisfied that there is a defence on merit. In this respect defence on merit does not mean, in my view, a defence that must succeed. It means as Sheridan J put it "a triable issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication."

The emphasis is on doing justice to the parties in the unique circumstances of each case. When asked by the appellant to review the decision of Muchelule, J that had set aside the *ex parte* judgment obtained in Kericho High Court, Nyamweya, J expressed satisfaction with the decision of Muchelule, J and concluded that the Judge had judicially exercised his discretion.

Nyamweya, J's decision was itself based on the exercise of discretionary powers to review its decree or order. **Section 80** of the Civil Procedure Act and **Order XLIV** (repealed) currently **Order 45** of the Civil Procedure Rules permit the court, on application to do so and to make "**such order thereon as it thinks fit".** In terms of **Order XLIV** any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if he can demonstrate that he has discovered 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. The court will also review its decision if it finds some mistake or error apparent on the face of the record. Finally, it is open to the court to review its decision if it finds any other sufficient reason to do so.

We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.

The broad question emanating from the summarized grounds is whether the learned Judge, in dismissing the application for review exercised her discretion in accordance with the justice of the case and the law. Put differently; did the appellant prove 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"

We cannot find any material from which we can conclude that there was discovery of new and important matter or evidence. The learned Judge was however categorical, and with respect, we agree, that the respondents were aware that the case had been transferred to Kericho. As a matter of fact on 27th April, 2009, when the case came up for hearing a Mr. Atanda is recorded to have been in attendance, holding brief for the respondents' advocate. On that day, the hearing was adjourned by consent to 27th and 28th May, 2009. In between, there was a call-over on 18th May, 2009 at which counsel for both parties were present and the hearing date was confirmed. On 27th May, 2009, up to 12.30pm, counsel for the respondents had not arrived in Kericho and a call to his cellphone was answered by the secretary who informed the caller that counsel for the respondents was before a two judge bench in the High Court at Nairobi. The hearing was, as a result, adjourned to 28th May, 2009. Once again on that day, counsel for the respondents failed to attend court prompting the Judge to proceed with the hearing of the case *ex parte*. We, on our part, like Muchelule, J have no doubt that the respondents were aware of the transfer of the case to Kericho and the hearing date. The learned Judge, in setting aside the *ex parte* judgment however found, as noted earlier, that the respondents had raised triable issues in their statement of defence; that the parties are related; and that the dispute relates to ancestral land. This decision has not been challenged on appeal.

The new and important matter or evidence the appellant relied on in the subsequent application before Nyamweya, J was the fact that although the respondents argued that they did not attend court at Kericho because of their ages and ill health, there was subsequent evidence to show that on 29th May, 2009 they were, together with their advocate before the High Court in HCSC No. 1672 of 2008 for confirmation of the grant. The appellant relied on the certificate of confirmation dated 29th May, 2009. There is nothing in the Certificate of Confirmation from which it can be concluded that the respondents and their counsel were personally before the High Court at Nairobi on 29th May, 2009, which was in fact the date the certificate was issued. We would know from the practice in the High Court that the certificate is usually issued some days after hearing the application for confirmation. Again, like Nyamweya, J we come to the conclusion that this did not constitute a new and important matter or evidence.

On the mistake or error apparent on the face of the record, the appellant submitted that by dismissing the application for review, the court was left with two sets of conflicting orders. On the one hand was the ruling of Muchelule, J under review and on the other were decisions made by Gachuhi, J, as he then was in 1982, Owuor, J, as she then was in 1988 and by Angawa, J in 2009.

While there cannot be a precise definition of what constitutes mistake or error on the face of the record, the Court in **Muyodi V. Industrial and Commercial Development Corporation & Another** (2006) 1 EA 243 explained

it as follows:

"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

The Court accorded no particular definition for an error apparent on the face of the record, stating that it would vary with each

particular case. But in an earlier Tanzanian decision in the case of **Chandrakhant Joshibhai Patel V R** (2004) TLR, 218, it was held that an error stated to be apparent on the face of the record:

'....must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions".

On this question too, we find no mistake or error in the decision of Muchelule, J in the terms explained above.

Considering the nature of the action, being a protracted dispute over land, which has been in the courts for very many years and the defence presented by the respondents, we think the learned Judge properly balanced the interests of the parties by judicially exercising her discretion in favour of having the dispute determined on merit. We stress that, as a general rule it is always paramount to ensure that nobody is denied an opportunity to be heard.

The suit property, as we have said, is in Kiambu County. The suit was filed in Nairobi. And although no hearing took place before Angawa, J the file was transferred to Kericho upon her transfer there. This is what has caused us anxiety. The respondents pleaded that they were very old people (over 70 years), peasant farmers and sickly and that requiring them to travel all the way to Kericho was punitive. We sympathize.

There is no doubt in our mind that, in the circumstances of this case, parties ought to be heard on the merits of their cases.

This appeal lacks merit. It is accordingly dismissed with costs. The main action must be listed for hearing without further delay.

Dated and delivered at Nairobi this 11th Day of May, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W.OUKO

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR